No. 10229

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
District of Montana

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Billings, Montana.

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Billings, Montana.
Attorneys for Defendant American Surety Company and Appellant. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

Be It Remembered, that on August 5, 1940, a Complaint was duly filed herein, in the words and figures following, towit: [2]

In the District Court of the United States
District of Montana
Great Falls Division

No. 203

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN V. GROGAN, and AMERICAN SURETY COMPANY, a corporation,
Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendants complains and alleges as follows:

I.

That the United States of America is the party plaintiff herein and brings this action on its own behalf, and this court has jurisdiction hereof by reason of the provisions of Section 41, Title 28, United States Codes.

II.

That at all of the times herein mentioned the American Surety Company, a corporation, was, is and continues to be a corporation duly organized

and existing under the laws of the State of New York and authorized to become a surety for hire.

III.

That on or about the 24th day of June, 1931, the plaintiff, being desirous of erecting certain buildings at the United States Inspection Station at Babb-Piegan, Glacier County, within the State and District of Montana, entered into a certain contract in writing with the defendant John V. Grogan, a full, true and correct copy of which said contract, save and except the specifications for construction and the maps and drawings thereto, which were made a part of the said contract, and save and except the directions for [3] the preparation of the Contract, is hereto attached, marked Exhibit "A", and hereof made a part.

IV.

That on or about the 29th day of June, 1931, the defendant John V. Grogan, as principal, and the defendant American Surety Company, a corporation, as surety, for the purpose of complying with the regulations of the plaintiff, and insuring the due performance of the said contract, Exhibit "A", made, executed and delivered to the plaintiff a bond in the penal sum of $25,000.00, a full, true and correct copy of the said bond, except for the instructions for executing the same, is hereto attached, marked Exhibit "B", and hereof made a part. That the said defendant American

Surety Company, a corporation, was a surety for hire on said bond.

V.

That a notice to proceed as required by said contract was given to the defendant John V. Grogan, by the plaintiff, on the 8th day of July, 1931, and thereupon the said defendant John V. Grogan commenced his performance of said contract.

VI.

That after the 8th day of July, 1931, but prior to the date fixed in said contract as the date for the completion of the said work, and while the contract was in full force and effect, it became necessary that certain changes be made in the work to be done, and that certain extra work be done and materials furnished of the reasonable value of $3,921.00, and which would increase the amount due under the said contract from $49,970.00 to $53,891.00, and as provided in the said contract such extra work to be done and materials to be furnished was ordered and the price fixed and the said John V. Grogan did agree to do such extra work and furnish such materials and to perform the said contract including the doing of the said extra work and the furnishing of said extra materials for the total sum or price payable to him of $53,891.00. [4]

VII.

That although it was provided in the said contract that the work was to be completed within 240 calendar days after the date of receipt of notice

to proceed, for various causes considered excusable under Article 9 of said contract, the said defendant John V. Grogan was delayed 473 calendar days in the performance of said contract and at his request, and with the consent of the plaintiff, and of the defendant American Surety Company, a corporation, the time for the completion of the work under the said contract was extended to June 20, 1933.

VIII.

That on June 20, 1933, the said defendant John V. Grogan had not completed the work that he agreed to perform under said contract and said work had not been entirely done and the said John V. Grogan had not performed his said contract as he had promised and agreed to do by completing the said work and all thereof agreed by him to be completed on the 20th day of June, 1933; and the said defendant John V. Grogan had not on July 20, 1934, completed all of the work that he promised and agreed to complete under his said contract and a part thereof was uncompleted, and said defendand John V. Grogan on said last mentioned date being in default in the performance of his said contract and having breached the same by not then on that date having completed all of the work that he promised and agreed to complete and to do under his said contract, the plaintiff, acting under the authority given to it in the said contract and in accordance with the terms thereof, on the said 20th day of July, 1934, notified the

said defendant John V. Grogan in writing that his right to proceed under the said contract was terminated on said date. [5]

IX.

That because of the wrongful refusal of the said defendant John V. Grogan to complete his said contract and perform the same and do all of the work he promised and agreed to do in said contract, it became necessary for the plaintiff to complete and cause the said work to be completed, and that in doing the same and completing the said work, the plaintiff expended in the completion of the same the sum of $3,781.00, which said sum was and is the reasonable value of completing the said work, that the said defendant John V. Grogan promised and agreed to do and complete; that because of the wrongful failure and neglect of the said defendant John V. Grogan to complete his said contract and fulfill the terms thereof and do the work he had promised and agreed to do, it became necessary for the plaintiff to employ a construction engineer from the 21st day of June, 1933, to the 30th day of June, 1934, both dates inclusive, and that the plaintiff was required to and did pay to said construction engineer for his services performed during said period of time the said sum of $2,288.62; that in addition the plaintiff was required by reason of the default and failure of the said defendant John V. Grogan as aforesaid to complete his said contract as afore-

said to cause inspections to be made on the said work done and performed by the defendant John V. Grogan on January 10, July 27, October 19, November 8 and December 7, 1934, and that the plaintiff, in so doing, necessarily laid out and expended for traveling expenses of engineers and their salaries, while engaged in said inspections, and their transportation, the sum of $414.00.

X.

That up to the 20th day of June, 1933, the plaintiff had paid to the said defendant John V. Grogan, for the work performed by him under the said contract, the sum of $49,602.50; [6] that by reason of the wrongful failure and refusal of the said defendant John V. Grogan to perform his said contract and to complete the work that he had promised and agreed to complete, the plaintiff was required to and did lay out and expend the sum of $6,483.62 in completing the said work that the said defendant John V. Grogan had promised and agreed to do and perform and complete, making a total cost to the plaintiff of $56,086.12; that had the said defendant John V. Grogan performed the said contract and completed the said work as he promised and agreed to do, the plaintiff would have been required to pay therefor only the sum of $53,891.00, and that by reason of the wrongful failure, refusal and neglect of the said John V. Grogan to perform his said contract and complete the work that he promised and agreed to complete, the plaintiff has been damaged in the sum of $2,195.12.

XI.

That paragraph 5 of the specifications which are attached to and made a part of the said contract, provided:

> "5. Liquidated Damages.—The contractor shall pay to the government the amount of Twenty Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract."

That said defendant John V. Grogan delayed his completion of the said contract for the period of 395 calendar days and thereby the plaintiff is and was damaged in the amount or sum of $9,875.00, in addition to the damages hereinabove set out.

XII.

That prior to the commencement of this action and on or about the 1st day of November, 1937, the plaintiff demanded of and from the defendants John V. Grogan and American Surety Company, a corporation, that they pay to it the sum of $12,070.12, the amount of damage sustained by the plaintiff by reason of the failure and default of the said defendant John V. Grogan in his [7] refusal to perform his said contract as aforesaid, but that the said defendants, and each of them, failed, refused and neglected to pay the said sum of $12,070.12, or any part or portion thereof and there is now due, owing and wholly unpaid from the defendants to the plaintiff the said sum of $12,070.12, together with interest thereon at the

rate of 6% per annum from the 1st day of November, 1937.

XIII.

That the plaintiff duly performed all of the conditions precedent on its part to be performed under said contract.

Wherefore, plaintiff prays damages against the said defendants and each of them for the sum of $12,070.12, together with interest thereon at the rate of 6% per annum from the 1st day of November, 1937, together with the plaintiff's costs and expenses necessarily incurred and disbursed in this action.

R. LEWIS BROWN,
Assistant Attorney of the United States, in and for the District of Montana.
Attorney for Plaintiff.

[8]

EXHIBIT A

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 24th day of June, 1931, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and John V. Grogan, of the city of Junction City, in the State of Kansas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Exhibit A (Continued)

Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana, for the consideration of forty nine thousand nine hundred seventy dollars ($49,970.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for the construction of the United States Inspection Station buildings at Babb-Piegan, Montana, with addenda therein, dated May 16, 1931, and drawings Nos. 1, 2, 3, 4, 100, 101, 200, 201, 202, 202A, 2-1, 2-2, 2-100, 3-1, 4-1, PHL-450, PHL-451, PHL-452, PHL-453, Miscellaneous 304E, 305G, Miscellaneous Lighting Fixtures 326B (said drawings being on file in the Office of the Supervising Architect, Treasury Department.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within two hundred forty (240) callendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like ef-

Exhibit A (Continued)

fect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, and equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment, the dispute

Exhibit A (Continued)

shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called [9] immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and may increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any

Exhibit A (Continued)

and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the ex-

Exhibit A (Continued)

penses of such examination, and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures, from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. [10]

Article 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifica-

Exhibit A (Continued)

tions as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employees as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Exhibit A (Continued)

ticle 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work; in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God,

Exhibit A (Continued)

or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto. [11]

Article 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour Law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at

Exhibit A (Continued)

the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully co-operate with such other contractors and carefully fit his own work to that

Exhibit A (Continued)

provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on [12] the site and preparatory work done may be taken into consideration.

Exhibit A (Continued)

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sold property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than

Exhibit A (Continued)

such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words "other than the contracting officer" in paragraph a, Article 18, and the addition of page 2-A relative to the "Rate of Wage" to be paid by the contractor, to which contractor consented in his telegram dated June 20, 1931.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Exhibit A (Continued)

We hereby certify that this contract and bond have been correctly prepared. [13]

THE UNITED STATES OF AMERICA.

By PERRY K. HEATH,
Assistant Secretary of the Treasury,
(Official Title)

JOHN V. GROGAN,
Contractor.
Junction City, Kan.
(Business Address)

H. S. ROOME,
Chief, Law & Records Division.

H. S. ROOME.

G. R. ROBERTS,
Actg. Supt., Architectural Engrg.

C. R. ROBERTS.

Two witnesses:

W. F. STEWART,
Junct. City, Kan.

W. A. ROBERTS.

I, ..., certify that I am the ..... Secretary of the corporation named as contractor herein; that ..... who signed the contract on behalf of the contractor, was then ..... of said corporation; that said contract was duly signed for and in behalf

Exhibit A (Continued)

of said corporation by authority of its governing body, and within the scope of its corporate powers.

.....

(Corporate Seal)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....

Contracting Officer.

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; December 20, 1928, V. 46, p. 120; March 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349. [14]

Rate of Wage—The following paragraph pertaining to the Rate of Wage shall apply to every contract in excess of five thousand dollars ($5,000) in amount:

The rate of wage for all laborers and mechanics employed by the contractor, or any sub-contractor, on the public building covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division of the state in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages

Exhibit A (Continued)

for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931 (Public No. 798). [15]

EXHIBIT "B"

Standard Form No. 25
Approved by the President
Nov. 19, 1926

STANDARD GOVERNMENT FORM OF PERFORMANCE BOND

(Construction or Supply)

Know All Men By These Presents, That we, John V. Grogan, of Junction City, Kansas, (See Instructions 4, 5 and 7) as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, whose principal office is located at 100 Broadway, New York City, New York, as Surety, (See Instructions 2, 3, 4 and 7)

are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Twenty-five Thousand dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated June 24th, 1931, for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House, indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties

have executed this instrument under their several seals this 29 day of June, [16] 1931, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] JOHN V. GROGAN,
Junction City, Kan.

In presence of—
M. F. STEWART,
Junction City, Kansas.
(Address)

Attest:

AMERICAN SURETY
COMPANY OF NEW YORK,
(Corporate Surety)
320 Patterson Bldg.
Denver, Colorado.
(Business Address)

(Affix corporate seal)

By J. C. SMITH,
J. C. SMITH
Resident Vice President.

A. QUINN
A. QUINN, Resident
Assistant
Secretary

The rate of premium on this bond is 15 per thousand, based on contract price.

Total amount of premium charged, $749.55.

(The above must be filled in by corporate surety.)

[Endorsed]: Filed Aug. 5, 1940. [17]

Thereafter, on October 8, 1940, a Motion to Strike, and Notice thereof, were duly filed herein, as follows, towit: [18]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF PLAINTIFF'S COMPLAINT

Comes now the Defendant, American Surety Company, a corporation, by and through the undersigned its attorneys, for itself and not for the remaining Defendant, and moves the court as follows, to-wit:

1. To strike from Plaintiff's complaint all of paragraph XI because the same is (a) redundant matter, and (b) immaterial matter.

Dated this 7th day of October, 1940.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
By STERLING M. WOOD,
Attorneys for Defendant,
American Surety Company,
a corporation.
Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [19]

[Title of District Court and Cause.]

NOTICE OF MOTION

To R. Lewis Brown, Esquire, Assistant Attorney of the United States in and for the District of Montana, Attorney for Plaintiff, and to the Said Plaintiff:—

Please take notice that upon the complaint herein the motion of the above-named Defendant, American Surety Company, a corporation, to strike certain portions of the Plaintiff's complaint will be presented for hearing and determination in the above-named court before the Honorable Charles N. Pray, Judge thereof, at the courtroom in the Postoffice Building in the City of Billings, County of Yellowstone, State of Montana, at the opening day of the next term of the said court at Billings, Montana, or as soon thereafter as counsel can be heard.

Dated this 7th day of October, 1940.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
By STERLING M. WOOD,
Attorneys for Defendant,
American Surety Company,
a corporation.
Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [20]

Thereafter, on July 22, 1941, an Order denying Motion to Strike, was duly entered herein, the minute entry thereof being in the words and figures following, towit: [21]

[Title of District Court and Cause.]

This cause having heretofore been submitted to the Court, on Motion of American Surety Co., to strike from complaint, came on regularly for decision this day, whereupon the court filed its written decision thereon and ordered said motion denied.

Dated July 22, 1941.

C. R. GARLOW,
Clerk. [22]

Thereafter, on September 17, 1941, Answer was duly filed herein, as follows, towit: [23]

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, American Surety Company, a corporation, in the above-entitled action, whose true name is American Surety Company of New York, by and through the undersigned its attorneys, for itself alone and not for the remaining defendant, and for answer to Plaintiff's complaint admits, denies and alleges as follows, towit:

I.

Admits the allegations of paragraphs I, II, III and IV of Plaintiff's complaint, but alleges that this answering Defendant's true name is American Surety Company of New York;

II.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph V of Plaintiff's complaint;

III.

Admits the allegations of paragraph VI of Plaintiff's complaint;

IV.

Admits as alleged in paragraph VII of Plaintiff's complaint that under the contract provisions the work was to be completed within 240 calendar days after the date of receipt of notice to proceed; admits further that for various causes excusable under Article 9 of the said contract the defendant, John V. Grogan, was delayed, and that the time for the completion of the work under the said contract was [24] extended with the consent of the Plaintiff and of this answering Defendant, but denies each, all and every of the remaining, other and further allegations of paragraph VII of Plaintiff's complaint;

V.

Admits as alleged in paragraph VIII of Plaintiff's complaint that on June 20th, 1933, the De-

fendant, John V. Grogan, had not completed the work agreed to be performed under the said contract; admits further that the said John V. Grogan had not on July 20th, 1934, completed all of the work under the said contract; admits also as alleged in paragraph VIII of Plaintiff's complaint that the Plaintiff acting under the said contract and on the 20th day of July, 1934, notified the Defendant, John V. Grogan, in writing that his right to proceed under the said contract was terminated, but denies each, all and every of the remaining, other and further allegations of paragraph VIII of Plaintiff's complaint;

VI.

Denies the allegations of paragraphs IX and X of Plaintiff's complaint;

VII.

Admits as alleged in paragraph XI of Plaintiff's complaint that paragraph 5 of the specifications attached to and made a part of the contract therein mentioned provides in part that the contractor shall pay to the government the amount of $25.00 as fixed, agreed and liquidated damages for each calendar day's delay in the completion of the contract, but denies each, all and every of the remaining, other and further allegations of paragraph XI of Plaintiff's complaint;

VIII.

Admits as alleged in paragraph XII of Plaintiff's complaint that prior to the commencement of this action and on or about the 1st day of November, 1937, Plaintiff demanded of and from this answering Defendant payment of the sum of $12,070.12; admits [25] further that this answering Defendant has refused to pay the said sum, but denies each, all and every of the remaining, other and further allegations of paragraph XII of Plaintiff's complaint;

IX.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph XIII of Plaintiff's complaint.

And further answering Plaintiff's complaint and by way of defense thereto, this answering Defendant alleges:

1.

That on or about the 17th day of October, 1933, the said Defendant, John V. Grogan, had substantially completed and performed the contract mentioned in Plaintiff's complaint, leaving only an unsubstantial part of the said contract then unperformed.

Wherefore, having fully answered Plaintiff's complaint this answering Defendant prays that the said Plaintiff recover nothing thereunder and that the

said answering Defendant recover its costs of suit herein incurred.

STERLING M. WOOD,
ROBERT E. COOKE,
By STERLING M. WOOD,
Attorneys for Answering Defendant, American Surety Company of N. Y.
Address: 219-223 Securities Bldg., Billings, Montana.

[Endorsed]: Filed Sept. 17, 1941. [26]

Thereafter, on December 5, 1941, Original Transcript of Evidence was duly filed herein, being in the words and figures following, towit: [27]

[Title of District Court and Cause.]

ORIGINAL TRANSCRIPT OF EVIDENCE

Appearances:

For United States
R. LEWIS BROWN, Esq.,
D. W. MURRAY, Esq.

For Defendants
MESSRS. WOOD & COOK. [28]

Be It Remembered, That this matter came on regularly for hearing at Great Falls, Montana, on

Saturday, November 29, 1940, before the Honorable Charles N. Pray, Judge Presiding, sitting without a jury.

Whereupon The following proceedings were had and done: [29]

The Court: We will take up the case on the calendar, of United States -vs- John J. Grogan, and American Surety Company. Are you ready to proceed with the case, Gentlemen?

Mr. Wood: Yes, we are ready.

Mr. Brown: We are ready.

The Court: Very well.

PLAINTIFF'S CASE

Mr. Brown: If the court please, I have a photostatic copy of the original records in Washington, numbered 1 to 398 inclusive, and they are certified to in one certificate, so that I will ask that the clerk cut the certificate, so that I may use it.

The Court: Very well.

Mr. Brown: We will offer in evidence plaintiff's proposed exhibit No. 1.

Mr. Wood: I would like to have the record show that at this time the defendant, American Surety Company, objects to the introduction of any evidence upon the ground that the complaint in this action fails to state a claim against the defendant, upon which any relief can be granted.

The Court: It is the same question we have already considered, is it not.

Mr. Wood: Not entirely. I presume you would just as leave that we file briefs afterwards.

The Court: I think probably a brief will be just as well. We have already had one phase of it, and, I believe, I stated at the conclusion of my statement then, that if you had any further authorities I would hear them.

Mr. Wood: That is right.

The Court: That if you had something further, or later [30] or something you may have discovered that you think has an important bearing on that issue, I will hear it, as I suggested in that memorandum.

Mr. Wood: I will be glad to present all these questions later. I will preserve my record as I go along. I have something to add to that objection. It is based upon the fact that it appears to us on the face of the complaint now, after careful consideration, that the government without right or authority terminated this contract, and thereby rescinded it, and discharged it, so that there is no obligation upon the part of either defendant, as far as that is concerned, in damages at this time.

The Court: You claim that the Government had no right to terminate the contract when it did.

Mr. Wood: Under the allegations of the complaint, we claim that the contractor continued on from June 20, 1933, to July 20, 1934, and that was some thirteen months beyond the date of completion. Then, at that time, the Government served a notice terminating the right to further proceed under the contract. Our contention now is that the Government, under the contract and under law,

in giving the notice to the contractor at that time, thereby breached the contract and discharged them, as far as the defendants are concerned, so that there is no liability upon their part now, which is simply another way of saying the complaint does not state a cause of action.

The Court: Very well, you may proceed Mr. District Attorney.

Mr. Brown: We now offer in evidence plaintiff's exhibit No. 1.

Mr. Wood: There is no objection to plaintiff's exhibit No. 1.

(Whereupon plaintiff's exhibit No. 1 was received in evidence, without objection, and is in words and figures as follows, to-wit: [31]

PLAINTIFF'S EXHIBIT No. 1

Case #203

UNITED STATES OF AMERICA

GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered C-1 to C-398 inc., are true copies of the official documents now on file in the General Accounting Office in the following case: John V. Grogan.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Account-

ing Office to be affixed this 3rd day of February, in the year 1937, at Washington

[Seal] R. N. ELLIRS,
Acting Comptroller General
of the United States.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

General Accounting Office Form 7.

Mr. Brown: We offer in evidence, if the court please, the plaintiff's exhibit No. 2, and the plaintiff's exhibit No. 3, and I will say in that connection, we allege in paragraph 5, that notice to proceed to the contractor was given to the contractor on the 8th day of July, 1931, and the contractor commenced to perform under the contract. That is denied. [32]

Mr. Wood: I will say that we are encumbering the record with unnecessary documents. I will now admit that the allegations in paragraph 5 of plaintiff's complaint are true, in order to save proof upon that matter.

Mr. Brown: All right, we will withdraw the exhibit then.

The Court: Very well. That will simplify and expedite the matter.

Mr. Brown: Paragraph 7 seems to be the next paragraph in issue here.

The Court: Yes.

Mr. Wood: I will further concede, your honor; for the record, and save putting in unnecessary proof, that the defendant John V. Grogan was delayed four hundred and seventy three days in the performance of his contract and that at his request and with the consent of the plaintiff and of the defendant American Surety Company, the time for the completion of the work under the contract was extended until June 20, 1933.

Mr. Brown: I will withdraw the offer of exhibit 4 then, your honor.

The Court: Very well then. That is paragraph 7.

Mr. Brown: Yes.

Mr. Wood: There were some denials that were made necessarily at the time the pleadings were prepared. Then we did not have the facts fully before us, but after talking with Mr. Brown, what I can see I can concede I gladly will so as to save that proof.

Mr. Brown: If the court please, I have photostatic copies of the original documents, numbered by them, X-1 through X-12, inclusive. I have not marked the certificate of the General Counsel as to their authenticity. I don't need all of them. [33] I will ask that the clerk cut them, so that I will have access to those that I need.

The Court: Very well.

Mr. Brown: I offer in evidence plaintiff's exhibit No. 7.

Mr. Wood: No objection to plaintiff's exhibit No. 7. It may be received in evidence.

(Whereupon plaintiff's exhibit No. 7 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 7

Case #203.

UNITED STATES OF AMERICA

FEDERAL WORKS AGENCY

PUBLIC BUILDINGS ADMINISTRATION

Washington

Dec. 7, 1940.

I hereby certify that the annexed documents numbered X-1 through X-12, inclusive, are true and correct copies of the official documents on file in this Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on the day and year first above written.

[Seal] ALAN JUHMTRUE,
General Counsel, Federal Works Agency.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: I offer in evidence, if the court please, plaintiff's exhibit No. 8. My purpose of this offer, which [34] is a letter from the United States to the Surety Company informing them that the contract had been cancelled, and inquiring of the Surety Company whether defendant, whether it desired to go ahead to complete the work. Now, I intend to follow that up with a letter back from the Surety Company, informing the United States that they did not desire to go ahead and complete the work. I intend in regular order to offer the contract.

Mr. Wood: The record already shows by admissions of the answers, that the notice had been given, the notice that the government relied upon, and these offered exhibits are unnecessary on that account, and I object to each of the offered exhibits as irrelevant for any purpose. I particularly object also to all this evidence as incompetent and particularly this type of evidence.

Mr. Brown: I offer exhibit No. 9, as long as objection was made to both of them I allege in the complaint that a notice was given to Grogan as to termination. My purpose is to show that it was done at the knowledge and request of the Surety Company. In connection with the notice in paragrapn 8, there are certain admissions made, and denials made of that paragraph.

The Court: I will overrule the objection to the admission of these letters.

(Whereupon plaintiff's exhibits 8 and 9

were received in evidence, and are in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 8

Case #203

Inclosure

Babb-Piegan, Mont
Insp'n St T 1 SA 1751

LEGAL [35]

July 20, 1934.

The American Surety Company of New York,
100 Broadway,
New York, N. Y.

Gentlemen:

Referring to the contract of John V. Grogan for the construction of the Inspection Station at Babb-Piegan, Montana, you are advised that the contractor's right to proceed with the work is terminated to take effect on this date.

An inventory of the work performed and material installed and upon the site will be taken by a construction engineer, and he has been directed to notify you of the date fixed by him for taking such inventory in order that you may have a representative present at the time if you so desire.

You are requested to acknowledge the receipt of this letter stating whether or not you desire to

complete the work as surety on the contractor's bond after the inventory has been taken.

Respectfully,

(Signed) G. P. PEOPLES,

Director of Procurement.

PLAINTIFF'S EXHIBIT No. 9

Case #203

Babb-Piegan Mont. Insp'n Sta

AMERICAN SURETY COMPANY

of New York

100 Broadway, New York

F. W. Lafrentz, Chairman of the Board.
R. R. Brown, Vice Chairman.
A. F. Lafrentz, President.

Legal Department

George L. Naught, Vice President and General Counsel.

July 23, 1934.

In re: B#-372473-D C#-143922 John V. Grogan-to-U. S. A.

Procurement Division, Public Works Branch,
Treasury Department,
Washington, D. C. [36]

Att'n Dir. of Procurement.

Gentlemen:

In reply to your letter of July 20th in regard to the contract of John V. Grogan for the con-

struction of the inspection Station at Babb-Piegan, Montana, you will please be advised that this Company as surety on the contractor's bond does not desire to complete the work. We therefore request that bids be obtained and the contract awarded to the lowest bidder.

Very truly yours,

GEORGE R. CROSBY,

Attorney.

(Received Division of Procurement Public Works Branch Jul 24 1934 S-1. Noted..... Ans's.....19)

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 10.

Mr. Wood: At this time the defendant objects to Plaintiff's Exhibit 10 as incompetent; it not appearing therefrom, or from any other evidence, that the bids are proposed to be let as covered by exhibit 10 for the completion of the work under the Grogan contract in accordance with the specifications and plans of that Grogan contract. Also object to it as irrelevant. So that there be no misunderstanding, I am not objecting to the way it is proved, but my objection as to competency goes to the other question, failure to lay a foundation for putting in evidence of this character.

Mr. Brown: This is an advertisement for bids.

On its face [37] its says that bids will be received at treasury department, for furnishing all material, all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-Piegan, Montana. Specifications may be obtained, and so forth, from the government office.

The Court: It may be admitted in evidence. The objection is overruled.

(Whereupon plaintiff's exhibit 10 was received in evidence, and is in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 10

Case #203

Babb-Piegan, Mont., U. S. Insp. Sta. Completion

Standard Government Form of Invitation for Bids (Construction Contract)

Treasury Department, Procurement Division, Public Works, Branch, Washington, D. C., May 22, 1934. Sealed Bids in Duplicate subject to the conditions contained herein, and of executive order No. 6646, Dated March 14, 1934, will be publicly opened in this office at 2 P. M., June 19, 1934, for furnishing all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-

Piegan, Montana, Specifications may be obtained from the Custodian at the Building or at this office in the discretion of the assistant director of procurement, public works branch. W. E. Reynolds, assistant director of procurement, public works branch.

Notice to Printer

This notice when used as an advertisement must be set Solid. The notice is to be used as a pay advertisement only when accompanied by written authority from the Department. The law forbids payment for advertisements not previously authorized. [38]

Where copies of plans are requested, a deposit of $ No will be required to insure their return.

Guarantee will be required with each bid as follows: (See paragraph 8 of instructions to bidders and paragraphs 7-11 of the specification).

Performance bond will be required as follows: 50 per cent of the amount of the contract, if the contract amount to $2,000 or more.

Liquidated damages for *dealy* will be as provided in the specification.

Partial payments will be made. (See article 16 of contract as modified by the specification).

Article on patents will be made a part of the contract. (See directions on back of contract).

Preference for domestic materials is required by title 111 of the act of March 3, 1933, Public No. 428. (Copy Attached).

Bids must be submitted upon the Standard Government Form of Bid and if the contract amount to $2,000 or more, the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

The right is reserved, as the interest of the Government may require, to reject any and all bids, to waive any informality in bids received, and to accept or reject any items of any bid, unless such bid is qualified by specific limitation.

Envelopes containing bids must be sealed, marked, and addressed as follows:

The Assistant Director of Procurement,
Public Works Branch,
Treasury Department,
Washington, D. C.

Bids for Completion
U. S. Insp. Station
Babb-Piegan, Montana.

To be opened at 2 P. M., June 19, 1934.

Note—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

Domestic Articles of Materials. The attention of Bidders is called to the Act of Congress, approved March 3, 1933, (Public No. 428) which provides:

Title 111.

Sec. 3 (A) Every contract for the construc-

tion, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured [39] articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be in the United States except as provided in section 2: Provided however, that if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(B) If the head of a department, bureau, agency or independent establishment which has made any contract containing the provision required by subsection (A) Finds that in the performance of such contract there has been a failure to comply with such provisions, he

shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or else where shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: Now, I offer in evidence Plaintiff's Exhibit No. 11, which is the contract entered into by the government.

Mr. Wood: We object to the offered exhibit, this being plaintiff's exhibit 11, upon the ground that it is incompetent, in that no proof or sufficient foundation has been laid or established that the government was proposing to complete the Babb-Piegan Station in accordance with the plans and specifications and contract with Grogan; also object to it as irrelevant.

The Court: Overruled.

Whereupon Plaintiff's Exhibit No. 11 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 11.

Case #203 TIPW 359

Standard Form No. 23

Approved by the President
Nov. 19, 1926

STANDARD GOVERNMENT FORM OF CONTRACT

(Construction) [40]

Procurement Division
Treasury Department
(Department)

McGinnis & Lancaster,
Box 134,
Browning, Montana
(Contractor)

Contract for completion of construction amount, $4,280.00

Place United States Inspection Station, Babb-Piegan, Montana.

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 22nd day of August, 1934, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and McGinnis & Lancaster, a corporation, a partnership, consisting of Daniel B. McGinnis and Wesley Earl Lancaster, of the city of Browning, in the State of Montana, hereinafter called the contractor,

Plaintiff's Exhibit No. 11 (Continued)

witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work: The contractor shall furnish all labor and materials, and perform all work required for completion of the construction of the Inspection Station at Babb-Piegan, Montana, for the consideration of four thousand two hundred eighty dollars ($4,280.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for completion of construction of the United States Inspection Station at Babb-Piegan, Montana, dated May 22, 1934.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within sixty (60) calendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall [41] keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the con-

Plaintiff's Exhibit No. 11 (Continued)

tracting officer, without whose decision said descrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary unless otherwise provided. Upon completion of the contract the work shall be delivered and undamaged.

Article 3. Changes—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be deter- [42] mined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Plaintiff's Exhibit No. 11 (Continued)

Article 4. Changed conditions.—Should the contractor encounter or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection—(a) All material and workmanship (If not otherwise designated by the specifications) shall be subject to inspection, examination, and test by the Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on.

Plaintiff's Exhibit No. 11 (Continued)

The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily [43] corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing our same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is

Plaintiff's Exhibit No. 11 (Continued)

found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of [44] production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7—Materials and workmanship—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the speci-

Plaintiff's Exhibit No. 11 (Continued)

fications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable. [45]

Article 8. Superintendence by contractor—The contractor shall give his personal superintendence of the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Plaintiff's Exhibit No. 11 (Continued)

ticle I, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages [46] because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of

Plaintiff's Exhibit No. 11 (Continued)

God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his finding of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and care of work—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour law—Convict labor—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours

Plaintiff's Exhibit No. 11 (Continued)

in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five [47] dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1921 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees—The contractor warrants that he has not employed any person to solicitor or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13.—Other contracts—The Government may award other contracts for additional work, and

Plaintiff's Exhibit No. 11 (Continued)

the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit—No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to [48] any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Dispute—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and pre-

Plaintiff's Exhibit No. 11 (Continued)

paratory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: and provided further, that on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, [49] including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified

Plaintiff's Exhibit No. 11 (Continued)

voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative. [50]

Article 19. Alterations—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words "other than the contracting officer", in paragraph a, Article 18.

In Witness Whereof, the parties hereto have exe-

Plaintiff's Exhibit No. 11 (Continued)

cuted this contract as of the day and year first written.

THE UNITED STATES OF AMERICA
By W. E. REYNOLDS
Acting Director of Procurement.
Treasury Department
(official title)

McGINNIS & LANCASTE
Contractor
By W. E. LANCASTE
DAN McGINNIS
Browning, Montana.
(business address)
WESLEY EARL LANCASTE
DANIEL B. McGINNIS

Two Witnesses:
J. L. SHERBURNE
MILDRED BOWE

I, certify that I am the secretary of the corporation named as contractor herein;
that
who signed this contract on behalf of the contractor, was then of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....

(Corporate Seal)

Plaintiff's Exhibit No. 11 (Continued)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, who signed this contract for the had authority to execute the same, for the individual who signs similar contracts on behalf of this corporation with the public generally.

.....

Contracting Officer. [51]

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; Dec. 20, 1928, V. 45, p. 1041; Mar. 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349.

Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Delation of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

Plaintiff's Exhibit No. 11 (Continued)

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it be deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

Article ..... Patents—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of the contract, excepting patented articles required by the Government in its specifications, the use of which the contractor [52] does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor", must be stricken out.

6. If approval of the contract is required before it shall become binding, the following article must be added: Article..... Approval—This contract shall be subject to the written approval of..... .....and shall not be binding until so approved. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

Plaintiff's Exhibit No. 11 (Continued)

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place the signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates [53] following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

Plaintiff's Exhibit No. 11 (Continued)

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The invitation, Bid, Acceptance, and Instruction to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Wood: I am not objecting to the character of the evidence because these are photostatic copies or anything of that sort. [54]

The Court: I understand that, Mr. Wood.

Mr. Brown: If the court please, we now offer in evidence plaintiff's exhibit No. 12, which is a public voucher of the contractors to public vouchers of the contractor executed in payment for work done on this exhibit 11, together with two checks, and the two checks total the amount of the contract price.

Mr. Wood: Let the record show that Mr. Brown and I have agreed heretofore as to this character

of evidence. So far as this kind of proof is being made it will not be objected to. There is no objection, in other words, to the competency, I would say to exemplified or photostatic copies, but I do object to plaintiff's offered exhibit No. 12 upon the ground first that it is incompetent, no sufficient foundation having been laid, or proof made that the work done, or the payment made for it was for the purpose of completing the Grogan contract in accordance with the plans and specifications, etc, of the Grogan contract, and furthermore it is likewise irrelevant.

The Court: Overruled.

Whereupon plaintiff's exhibit 12 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 12

Case #203

Washington, D. C.

Treasury Nov. 24, 1934 2,380

TREASURER OF THE UNITED STATES

Division of
Disbursement
(Seal)
Object for which drawn
592134
Public Building
Construction

Pay in Dollars Two Thousand Three Hundred

Eleven 20/100 $2311.20 [55] to the Order of McGinnis & Lancaster

G. F. ALLEN
Chief Disbursing Officer
By Besnk
10-007

(Endorsed on back)

McGinnis & Lancaster

W. E. Lancaster

Dan McGinnis

Received Payment From The Treasurer of the United States Nov 30, 1934 Helena Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana.

Public Voucher for Purchases, and Services Other Than Personal.
Standard Form No. 1084 Nov 11, 1934
592134

Voucher prepared Babb-Piegan, inspection Station, Montana. U. S. Treasury Department Office of Supervising Architect Appropriation: "Inspection Station, Babb-Piegan, Montana. 2882402
The United States, Dr. To McGinnis & Lancaster.
Address Browning, Montana.
(Paid By G. F. Allen Chief Disbursing Officer Division of Disbursement Treasury Department CK.SYM 10-007

(Payee must NOT use this space) Contract No. TIpw-359 Date 8-22-34
Activity . . INsp Sta. Babb-Piegan Montana

No. and Date of Order	Date of Delivery or Service	Articles or Services	Amount
7-20-1935	11-9-34	Contract for completion construction.	$4,280.00
		Less value work uncomplete	1,712.00
			2,568.00
		Less 10% retained	256.80
			2,311.20
		Less payments on account	0.00
		Total	$2,311.20

I certify that the above bill is correct and just, and that payment therefor has Not been received. Payee—McGinnis & Lancaster

DAN McGINNIS
W. E. LANCASTER
Title-Partners [56]

I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the service performed as stated: that they were procured under the contract numbered above or unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising under the circumstances stated in No. . . . . of "method of

or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charges are just and reasonable and in accordance with the agreement.

Approved for $2311.20
By direction of the Secretary
H. S. ROBINSON
Superintendent, Accounts
LYLE G. HOOVER
Custodian.

Paid by Check No. 2380, dated Nov. 24, 1934

Washington, D. C.
Treasury Apr. 22, 1935 4,453

TREASURER OF THE UNITED STATES

Division of
Disbursement
(Seal)
Object for which
drawn
1354521
Public Building
Construction

Pay In Dollars One Thousand Nine Hundred Sixty Eight 80/100 $1,968.80 To the Order of McGinnis & Lancaster

G. F. ALLEN
Chief Disbursing Officer
By Besnk 10-007

Received payment from the Treasurer of the United States, Apr. 27, 1935 Helena, Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana 93-26
(endorsed on back)
McGinnis & Lancaster
W. E. Lancaster
Dan McGinnis

Public Voucher for Purchases, and Services Other Than Personal. Standard Form No. 1084. No. 1354521. [57]

Babb-Piegan, Montana 2/8/35.

Procurement Public Works Branch.

U. S. Treasury Department office of Supervising Architect.

Appropriation "inspection Station Babb-Piegan, Montana".

2x82402 (Received-Feb 21, 1935)

The United States Dr. To McGinnis & Lancaster.

Address Browning, Montana.

(Payee must NOT use this space) Contract No. TIPW-359 Activity Completion Contract Babb-Piegan, Mont.

Expenditure Symbol	Date of Delivery and Service	Articles or Services	Amount
7/20/35	1/28/35	Contract for completion construction	$4,280.00
		Less Voucher dated 11/9/34.	$2,311.20
			$1,968.80
		(Received Feb. 14, 1935 District Engineer Kansas City, Mo.	
		Total	$1,968.80

I certify that the above bill is correct and just, and that payment thereof has Not been received.

McGINNIS & LANCASTER
W. E. LANCASTER
DAN McGINNIS

I certify that the above articles were received in good condition after due inspection, acceptance, and delivery prior to payment as required by law, or the services performed as stated: that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No.....of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for $1968.80
By direction of the Secretary

H. G. ROBINSON
Superintendent, Accounts Division
LYLE HOOVER
Custodian [58]

Paid by Check No. 4453. Apr. 22, 1935. C-254.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: I might say that the two checks total the amount of $4,280.00, the amount of the contract price. However, the Government only claims as against the defendant the amount of $3,781.00, that it alleges in its complaint. I make that statement so that there won't be any contention that we might have a right to amend our complaint to conform to the proof.

Mr. Wood: Perhaps we should also state for the record, so that the court better understands, that Mr. Brown and I have agreed heretofore that there were some items included in the $4,280.00 payment that were not properly chargable against Mr. Grogan individually. That is why the amount was reduced to $3,781.00.

The Court: Very well.

Mr. Brown: Now, if the court please, in reference to paragraph 9 of the complaint, that was denied. That paragraph deals largely with the payment that we claim the United States paid, and that we are attempting to recover. We allege that they paid the construction engineer $2,288.62. I am going to offer those checks in substantiation of that. With reference to paragraph 9, your honor, Mr. Wood tells me that he will agree that the Government paid two checks to J. V. Levine, a construction engineer, between the first day of June 1933 to the thirtieth day of June, 1934, as alleged in that paragraph, the amount of $2,137.54. Now, that is a little less than the amount that we plead, but we have totaled [59] the checks that I have, and that is

the total, this $2,137.54, and Mr. Wood also tells me that he will agree that the Government paid to various of its engineers, in salaries, and in repayment for expenses, for traveling expenses incurred as alleged in paragraph 9, on January 10, July 27, October 19, November 8, and December 7, 1934, the amount of $414.00. As I understand it that is for the purpose of expediting the trial, and, of course, there is no admission of any liability, or anything of that kind.

Mr. Wood: Mr. Brown's statement in the record is correct. I do make those admissions, and agree that the sums mentioned were in fact paid to the persons to whom they were paid, but I admit nothing more.

The Court: Very well.

Mr. Brown: Mr. Wood tells me in regard to paragraph 10 of the Complaint, that he will admit that the United States paid to Grogan under his contract the amount of $49,602.50. The amount that we alleged in that paragraph in that complaint.

Mr. Wood: The record may so show. I do agree that that payment was made.

The Court: Very well.

Mr. Brown: I think the Government has established its case in chief. The matters that were in controversy were agreed to.

Mr. Wood: I now desire to move to dismiss this action as against the American Surety Company, which is the only defendant before the court, and the only defendant that has been served, upon the

ground that upon the facts and the law the plaintiff has shown no right to relief. That, of course, is in line with the objection made at the opening of the case to the introduction of any evidence, and beyond that we have no [60] proof to offer, or decline to introduce any proof, and we rest our own case.

The Court: I will take the case then, under advisement subject to your objections, and consider your briefs.

Mr. Brown: I would like to have the Court grant us twenty days within which to file our brief, and our proposed Findings of Fact and Conclusions of Law, and we would like to have five days to reply to any brief that the defendant filed in behalf of the Surety Company.

Mr. Wood: I suppose we can have twenty days intervening to file our brief.

The Court: Very well, if you deem that sufficient.

Mr. Brown: Mr. Wood has ordered a transcript for the Court's convenience, and I would ask that the order as to the brief might be that we have twenty days from the time of the delivery of the transcript.

The Court: That will be satisfactory.

[Endorsed]: Filed December 5, 1941. [61]

Thereafter, on April 27, 1942, Findings of Fact and Conclusions of Law were duly filed herein, being in the words and figures following, to wit: [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the Court, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a Corporation, the defendant, John V. Grogan, having never been served with process herein; the plaintiff was represented by its counsel, R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States, in and for the District of Montana, and the defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon, oral and documentary evidence was introduced by and on behalf of the plaintiff herein, and at the end of the plaintiff's case, the defendant, American Surety Company, announced it had no evidence to offer; thereupon, each of the parties was by the Court given time within which to prepare and submit briefs and proposed findings of fact and conclusions of law, and each of the parties having submitted its said brief, proposed findings of fact and conclusions of law, and after consideration by the Court of the evidence and the pleadings and the briefs of the parties, and the Court being fully advised in the premises, now makes and orders filed these, its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1.

That on the 24th day of June, 1931, the plaintiff and the [63] defendant, John V. Grogan, entered into the contract, in writing, which is attached to the plaintiff's complaint as Exhibit "A", for the construction and erection of certain buildings at the United States Inspection Station at Babb-Piegan, in the State and District of Montana, for the price of $49,970.00, to be paid to the said contractor upon full completion of the work in the time and in the manner provided in said contract; that while the said contract was in full force and effect, certain changes in the work to be done and certain extra work and materials were agreed to be furnished of the reasonable value of $3921.00, which said sum the United States agreed to pay, which increased the amount to be paid by the United States to the contractor to the sum of $53,891.00 for the completion of the work at the time and in the manner as provided in the said contract.

2.

That at all of the times mentioned in the plaintiff's complaint and the evidence, the defendant, American Surety Company, a Corporation, was, and continued to be, a corporation duly organized and authorized to become a surety for hire.

3.

That on or about the 29th day of June, 1931, the defendant, American Surety Company, a Corpora-

tion, became a surety for the defendant, John V. Grogan, and his faithful performance of the contract, and the said defendants made, executed, and delivered to the plaintiff the instrument and bond attached to the plaintiff's complaint as Exhibit "B", and that the said Surety Company was a surety for hire on said bond.

4.

That notice to proceed under said contract, as provided by the terms thereof, was given to the said John V. Grogan on the 8th day of July, 1931, and he thereupon commenced his performance of said contract.

5.

That for causes considered excusable by the plaintiff under Article 9 of the said contract, the plaintiff, at the request of the defendant, John V. Grogan, and with the consent [64] of the defendant Surety Company, extended the time for the completion of the work under the said contract to June 20, 1933.

6.

That it was provided in said contract that the contractor should pay to the plaintiff the amount of $25.00 a day as fixed, agreed, and liquidated damages for each calendar day's delay in the completition of the contract.

7.

That the defendant, John V. Grogan, had not completed the work he agreed to perform under the said contract upon the 20th of June, 1933, and he

had not completed all the work he promised and agreed to do in said contract on the 20th day of July, 1934, and on said 20th day of July, 1934, he being in default under said contract and having breached the same, and because of said default and breach, and as provided in the said contract, the plaintiff, on the said 20th day of July, 1934, gave to the defendant, John V. Grogan, a notice, in writing, that his right to proceed under the said contract was terminated on said 20th day of July, 1934.

8.

That because of the failure of the said defendant, John V. Grogan, to perform his contract, as he was required to do, and to complete the work which he had promised and agreed to complete within the time specified in said contract and granted by the plaintiff, it became necessary for the plaintiff to cause the said work to be completed and performed, and at the request of the defendant, American Surety Company, a Corporation, the plaintiff advertised for bids for doing and completing the said work, and let the contract for completing the said work to the lowest, responsible bidder.

9.

That because of the failure of the defendant, John V. Grogan, to perform his said contract and his breach thereof, the plaintiff was required to, and did, necessarily lay out and expend the sum of $2,044.04 more in causing the said work [65] to be done and in completing the said contract than it

would have been required to lay out and expend had the said defendant, John V. Grogan, duly performed his said contract and completed the work, as he had promised and agreed to do.

10.

That 395 calendar days elapsed between the 20th day of June, 1933, the time fixed under the contract for the completion of the said work, and the 20th day of July, 1934, the date upon which the defendant's, John V. Grogan's, right to proceed under the contract was terminated by the plaintiff.

11.

That, except as expressly contrary hereto, the Court finds all of the facts set out in the plaintiff's complaint to be true and established by the evidence, and the affirmative facts set out in the Answer of the defendant, American Surety Company, a Corporation, to be not established by the evidence.

From the foregoing findings of fact, the Court concludes the law, as follows:

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction hereof.

2.

That because of the failure of the defendant, John V. Grogan, to complete his said contract and perform the work he agreed therein to do and perform, the plaintiff was required to perform the

same at an additional cost and expense to it in the amount of $2,044.04, and has been damaged in that amount.

3.

That by reason of the delay of 395 calendar days on the part of the defendant, John V. Grogan, in his completion of the said contract, the palintiff has been damaged in the sum of $9,875.00.

4.

That the plaintiff is entitled to recover of and from the defendant, American Surety Company, a Corporation, [66] the sum of $2,044.04, and the further sum of $9,875.00, with interest thereon at the rate of six per cent (6%) per annum from the 1st day of November, 1937, and for its costs of suit herein necessarily expended, and is entitled to a judgment therefor.

Done and dated, April 27th, 1942.

CHARLES N. PRAY
Judge.

Lodged in Clerk's Office Jan. 20, 1942. C. R. Garlow, Clerk.

[Endorsed]: Filed April 27, 1942. [67]

Thereafter, on April 27, 1942, Judgment was duly filed and entered herein, being in the words and figures following, to-wit: [68]

In the District Court of the United States
District of Montana
Great Falls Division

No. 203

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN V. GROGAN and AMERICAN SURETY COMPANY, A Corporation,

Defendants.

JUDGMENT

This cause came regularly on for trial before the Court, Honorable Charles N. Pray, Judge presiding, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a corporation; plaintiff was represented by its counsel, W. D. Murray and R. Lewis Brown, Assistant Attorneys of the United States in and for the District of Montana, and defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon oral and documentary evidence was introduced by and on behalf of the plaintiff herein and no evidence was introduced either by or on behalf of the defendant, American Surety Company, a corporation; thereupon and at the close of plaintiff's evidence, both parties having rested, the plaintiff and the defendant, American Surety Company, a corporation,

asked for and were granted time within which to prepare, serve and filed their briefs and proposed findings of fact and conclusions of law; said briefs and proposed findings of fact and conclusions of law thereafter having been filed, the cause was submitted to the Court for consideration and decision.

Thereafter, the Court, having fully considered all of the evidence, introduced, as well as the admissions made by counsels at the trial of the cause, together with the briefs of the parties hereto, and being duly advised as to the law and the facts, did on the 15th day of April, 1942, render its opinion herein in favor of the plaintiff and against the defendant, [69] American Surety Company a corporation, and did thereafter and on the 27th day of April, 1942, make and sign and order filed its findings of fact and conclusions of law herein, and the same were entered and filed in the office of the Clerk of this Court on said date and are herein referred to and hereof made a part as fully and as completely as though here set out at length.

Wherefore, by reason of the law and the premises and the findings of fact and conclusions of law of the Court, It Is Ordered, Adjudged and Decreed and this does Order, Adjudge and Decree that the plaintiff, United States of America, do have and recover of and from the defendant above-named, American Surety Company a corporation, the sum of $11,919.04, together with interest at the rate of six (6%) per cent. per annum from the 1st day of November, 1937, amounting to the further sum of $2,-

481.15, amounting in all, principal and interest, to the sum of $14,400.19, together with the plaintiff's costs and disbursements herein necessarily incurred, amounting to the sum of $33.20.

Done and Dated April 27th, 1942.

CHARLES N. PRAY
United States District Judge.
District of Montana.

[Endorsed]: Filed & Entered Apr. 27, 1942. [70]

Thereafter, on July 21, 1942, Notice of Appeal was duly filed herein, being as follows, to wit: [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To United States of America, the above named Plaintiff, and to R. Lewis Brown, Assistant Attorney for the United States, in and for the District of Montana, its attorney, and to the Clerk of the Above Named Court:

You and each of you will please take notice that the Defendant, American Surety Company, a corporation, in the above entitled action, by and through the undersigned its attorneys, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, made and entered in favor of

the Plaintiff and against the Defendant, American Surety Company, a corporation, in the above entitled action upon the 27th day of April, 1942.

Dated this 20th day of July, A. D. 1942.

STERLING M. WOOD and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Defendant,
American Surety Company,
a corporation.

[Endorsed]: Filed July 21, 1942. C. R. Garlow, Clerk. [72]

Thereafter, on July 21, 1942, Cost Bond on Appeal was duly filed herein, being as follows, towit: [73]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, American Surety Company, a corporation, as Principal, and New York Casualty Company as Surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said United States of America, to which payment well and truly to be made we bind

ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 29th day of June in the Year of Our Lord 1942.

Whereas, lately in the above entitled action a judgment was rendered against the Defendant, American Surety Company, a corporation, therein, and the said Defendant is about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment, and the whole thereof, to reverse the said judgment;

Now, Therefore, the condition of the above obligation is such that if the above named Defendant, American Surety Company, a corporation, shall pay all costs, if the said appeal is dismissed or judgment affirmed, or shall pay such costs as the appellate [74] court may award if the said judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

In accordance with Rule 90 of the Rules of the above-named District Court of the United States, for the District of Montana, the said New York Casualty Company the surety herein, expressly agrees that in case of a breach of any condition of this bond that the above named court, upon notice to the said surety of not less than ten days, may proceed summarily in the above entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment there-

for against the said surety, and award execution therefor.

[Seal] AMERICAN SURETY COMPANY, a corporation

By N. KLOTZ

Its Resident Vice-President

Attest:

A. DONALDSON

Res. Asst. Secretary

[Seal] NEW YORK CASUALTY COMPANY

By W. D. HABISH

Its Resident Vice-President

Attest:

A. DONALDSON

Resident Asst. Secretary

Countersigned:

SCHROEDER BROS. CO.

By JOHN W. SCHROEDER,

Secy.

Resident Agent New York Casualty Company at Helena, Montana.

[Endorsed]: Filed July 21, 1942. C. R. Garlow, Clerk. [75]

Thereafter, on July 29, 1942, Stipulation as to contents of Record on Appeal was duly filed herein, as follows, towit: [76]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned attorneys for the respective parties to the above entitled action as follows, to-wit:—

I.

That the part of the record in the above entitled action to be included in the record on appeal of said action from the above named Court to the United States Circuit Court of Appeals for Ninth Circuit shall be as follows, to-wit:—

(a) Plaintiff's Complaint.

(b) Notice and motion of October 7, 1940 to strike portions of Plaintiff's Complaint.

(c) Minute order of July 22, 1941, denying the last mentioned motion.

(d) Answer of the Defendant, American Surety Company of New York.

(e) Original transcript of evidence taken at the trial of said action and prepared by the court reporter who reported the trial.

(f) Findings of Fact and Conclusions of Law adopted by the Court.

(g) Judgment of April 27, 1942

(h) This stipulation.

(i) Notice of Appeal of the Defendant, American Surety Company of New York.

(j) Cost bond on appeal of the Defendant, American Surety Company of New York. [77]

This stipulation is made under Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States and instead of serving designations as provided for in Rule 75 (a) of the aforesaid rules.

Dated this 22nd day of July, A. D. 1942.

R. LEWIS BROWN
Assistant Attorney of the United States, in and for the District of Montana
STERLING M. WOOD and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Defendant, American Surety Company, a corporation.

[Endorsed]: Filed July 29, 1942. C. R. Garlow, Clerk. [78]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for Ninth Circuit, that the foregoing volume consisting of

81 pages, numbered consecutively from 1 to 81 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case Number 203, United States of America vs. John V. Grogan and American Surety Company, a corporation, designated by the parties as the record on appeal herein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said Transcript of Record amount to the sum of Thirty-seven and no/100ths.....Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 29th day of July, A. D. 1942.

[Seal] C. R. GARLOW,
Clerk, U. S. District Court,
District of Montana.
By C. G. KEGEL
Deputy Clerk. [81]

[Endorsed]: No. 10229. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed August 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS AND DESIGNATION UNDER RULE 19

Comes now the Appellant in the above-entitled action, by and through the undersigned its attorneys, and in compliance with paragraph 6, Rule 19, of the rules of the above-named Court, states that the points on which the said Appellant intends to rely on the appeal taken in the said action are as follows, to-wit:

(a) That under the pleadings and the evidence in said action the Appellee is not entitled in any event to recover liquidated damages;

(b) That there has been a complete failure of proof by the Appellee and that accordingly the judgment from which the appeal has been taken in the above-entitled action is without support in the record;

(c) That there is no evidence in the record to support the judgment from which the appeal in the above-entitled action has been taken.

And the said Appellant further states that the parts of the record which it deems necessary for a consideration of the appeal in the above-entitled action are the pleadings, evidence and judgment, and preliminary motions and orders, all as more particularly set forth in the stipulation of the parties to the said action as to the part of the record to be included in the record on appeal, to which said stipulation reference is hereby made.

Dated at Billings, Montana, this 10th day of September, A. D. 1942.

STERLING M. WOOD
and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Appellant.

[Endorsed]: Filed Sep. 14, 1942.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, April 22, 1943

Before GARRECHT, HANEY, and HEALY, Circuit Judges

Order of submission

Ordered appeal herein argued by Mr. Sterling M. Wood, counsel for appellant, and by Mr. John B. Tansil, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, June 24, 1943

Before GARRECHT, HANEY and HEALY, Circuit Judges

Order directing filing of opinion and filing and recording of judgment

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10,229—Jun. 24, 1943

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

Before GARRECHT, HANEY, and HEALY, Circuit Judges

HEALY, C. J.

One Grogan entered into a contract with the United States for the erection of some buildings at the Government inspection station at Babb-Piegan, Montana. Appellant wrote the bond securing the performance of the contract. Grogan's time for the completion of the buildings expired June 20, 1933, at which date the work was only partially completed. However, the Government permitted him to continue with it for thirteen months thereafter, or until July 20, 1934, at which time the job was still uncompleted. Grogan was then notified that his right to proceed under the contract was terminated; and the Government thereupon took over the work and finished it.

The contract is the standard form of construction contract. Article 9 thereof, so far as pertinent, reads as follows:

"Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay

until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; * * *"

The liquidated sum agreed upon was $25.00 per day.[1]

In this suit, which is against the surety alone, the court awarded two items of damage: (1) the sum of $2,044.04 as the excess cost of completing the structures; and (2) the sum of $9,785.00 as liquidated damages for the delay of 395 calendar days elapsing between the date the work should have been completed under the terms of the contract and July 20, 1934—the date when the Government itself took over. The main dispute here concerns the latter award.

Counsel for the Government say that Article 9 covers three distinct situations: (1) where, at or before the date fixed for completion, the Government elects to terminate the contractor's right to proceed and takes over the work itself or through some other contractor; (2) where the Government elects to allow the contractor to continue after the date specified for completion, and the contractor finishes the work late; and (3) where the Government elects to allow the contractor to continue after the date specified for completion, but the contractor fails to finish the work even at a later date, and the Government then elects to terminate his right to proceed and finishes the work itself or through another contractor. The parties are agreed that in situation (1) the liquidated damages provision is not operative, and that in situation (2) it is. The point of disagreement is whether the provision is operative in situation (3), or, to state the disagreement more specifically, whether Article 9 makes any provision for a case like the present.

It is to be observed that there is here no question of actual damages recoverable under principles of the common law. The inquiry relates merely to the reach of a special stipulation agreed upon as a substitute for the ordinary mode of proving damages. By its very nature a stipulation for liquidated damages has no force save in the contingency made the subject of the special agreement.[2] To extend the stipulation to other contingencies by a process of reasoning or by analogy would amount to a rewriting of the contract.

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[1] The Act of June 6, 1902, 32 Stat. 326, 40 U. S. C. A. § 269, provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties."

[2] 15 Am. Jur., Damages, § 261; Wise v. United States, 249 U. S. 361.

Under this contract not all inexcusable delays are made compensable by payment of the stipulated sum. Thus where the contractor breaches his agreement to finish the work within a specified time and the Government declines to allow him to proceed beyond the completion date, vexatious delays resulting in the temporary loss of use of a needed structure inevitably ensue; but in such contingency the Government has limited itself to the recovery of excess costs plus such other damages, not inconsistent with the contract, as are recoverable under general legal principles. In what contingency, then, is delay here made compensable by the exaction of the stipulated sum? The sole contingency specified is "if the Government does not terminate the right of the contractor to proceed." The situation contemplated—or at any rate agreed upon—is one where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance. In that event only, it was agreed a specific sum was recoverable in lieu of the damages actually sustained but thought incapable of proof. What the trial court did was to extend the agreement to a different situation, one in which it might well have been, but was not, agreed that the stipulation should govern.

Counsel for the Government make this argument: "If the right to delay damages is conditioned upon the government's never taking over the work no matter how long the contractor's delay nor what the reason for it, then in every case the contractor and his surety can avoid liability for delay damages by the easy expedient of refusing to fulfill his obligation to continue the work, stopping just short of completion, and forcing the government to take over." The argument appears to neglect the right of the Government to recover actual damages for delay, or to confuse that right with the totally different one in dispute here. The Government had the option of terminating Grogan's right to proceed at any time after June 20, 1933. When it finally did so because of Grogan's continuing default, its action rendered the stipulation for liquidated damages inoperative. The stipulation simply vanished from the picture, so that neither party is in a position to invoke it. But it does not follow that the Government was thereby stripped of the right to recover such actual damages for the delay as it might be able to prove. Inability of the Government to make the necessary proof affords no justification for stretching the agreement to fit the Government's necessities.[3]

[3] Cf. United States v. O'Brien, 220 U. S. 321; Stone Sand & Gravel Co. v. United States, 234 U. S. 270.

The Court of Claims, in a number of cases, has had occasion to interpret this article of the standard contract and has reached the same conclusion as ourselves, albeit by a somewhat different route.[4] So also has the Court of Appeals of the District of Columbia.[5] No other cases dealing directly with the point have been called to our attention.

Appellant takes exception also to the award of excess costs. As to this item the court found that because of Grogan's failure to perform his contract the Government necessarily expended the sum of $2,044.04 more in causing the work to be done and in completing the contract than it would have been required to pay out had Grogan duly performed. It is claimed that the proof is insufficient to support this finding or to justify the award.

We do not agree. It was shown that the surety was given notice that a Government construction engineer would take inventory of the state of the work, and an invitation was extended the surety to have a representative present. The surety was requested also to advise whether it desired to complete the work. The only response to these invitations was a request by the surety that the contracting officer obtain bids and award the contract for completion to the lowest bidder.

This the officer proceeded to do. A contract was let for the performance of all work and the furnishing of all labor and materials "required for completion of the construction of the Inspection Station at Babb-Piegan, Montana." The surety has not challenged the reasonableness or good faith of the determination by the contracting officer embodied in the latter's specifications as to the work necessary to carry the project to completion. It made no effort to show any discrepancy between the specifications of the original contract and those of the contract let for completion of the work. By Article 15 of the Grogan contract the parties had agreed that the contracting officer or his representative should decide all disputes concerning questions of fact arising thereunder. Grogan's default and the surety's ensuing request made it necessary for the contracting officer to determine what must be done to complete Grogan's undertaking. In performing this duty the contracting officer had to make a determination of fact. The officer's determination, we think, was inseparable from the duty resting on him under the contract, the performance of which appellant had guaranteed.

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[4] Fidelity Casualty Co. of N. Y. v. United States, 81 Ct. Cls. 495; Commercial Casualty Insurance Co. v. United States, 83 Ct. Cls. 367; American Employer's Insurance Co. of Boston v. United States, 91 Ct. Cls. 231; Maryland Casualty Co. v. United States, 93 Ct. Cls. 247.

[5] United States v. Cunningham, 125 F. 2d 28.

In respect of the award of liquidated damages the judgment is reversed. As regards the award of excess costs it is affirmed.

Haney, C. J., did not participate in the consideration or decision of this case.

[Endorsed:] Opinion. Filed Jun. 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Upon appeal from the District Court of the United States for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause with respect to the award of liquidated damages be, and hereby is reversed, and that the judgment of the said District Court in this cause as regards the award of excess costs be, and hereby is, affirmed.

[Endorsed:] Judgment. Filed and entered June 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under Rule 38 of the revised rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

one hundred (100) pages, numbered from and including 1 to and including 100 to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof, remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of August 1943.

PAUL P. O'BRIEN.
Paul P. O'Brien, *Clerk*.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

No. 203

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN V. GROGAN, AND AMERICAN SURETY COMPANY, A CORPORATION, DEFENDENTS

The above-entitled action was tried to the court without the intervention of a jury, according to agreement of counsel.

The purpose of the action is to recover damages allegedly sustained by plaintiff for failure of defendant Grogan to perform a written contract for the construction of an Immigration Station at Babb-Piegan, Montana. Service was not obtained upon the defendant contractor, John V. Grogan, and trial was had against the defendant, American Surety Company. From an examination of the pleadings, transcript of evidence, briefs, admissions and denials of the parties, the court is satisfied that the allegations of the complaint have been sustained by a clear preponderance of the evidence, no proof having been submitted on the part of defendant, Surety Company, it having rested its defense mainly upon its interpretation of article nine of the contract in question.

The defendant Grogan was delayed 473 days in the performance of his contract and at his request and with consent of plaintiff and of the defendant American Surety Company, the time for the completion of the work under the contract was extended until June 20, 1933, which would indicate that the contractor was given considerable latitude in the performance of his contract, and aside from having the date for completion extended, after such delays, he was also allowed 13 months more, after the date fixed for completion, for performance of his contract, before the government terminated his right to proceed further. The contractor was given this opportunity to finish the work, and for that period of time, after the definite date for completion. The government during that period was deprived of the use and occupation of the premises, and there is nothing in the language

of the contract to warrant the interpretation that there was a choice of two remedies in case of default, which when made would exclude the other. Material part of article 9, in question, reads as follows: "Article 9, Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *."

Whether the plaintiff would be entitled to exercise both remedies provided in the contract would depend upon the state of facts before the court. If on the date when the work was to be completed the plaintiff had terminated the contract, the provision for the payment of $25.00 per day for each day of delay up to the date of completion could not apply for obvious reasons. But if the contractor is allowed to go ahead after the due date and dallies along with the work for 13 months without finishing, it would seem to be the better sense and reasoning to hold that the plaintiff would be entitled to collect for such delay according to the plain terms of the contract.

It seems to this court that the choice of language in article 9 was wisely made to provide for just such a state of facts as is found to exist here. What is there in the wording of the article to justify the assumption, following one line of authorities, that upon the adoption of one course the other "passes out of the picture." When the contractor is given an opportunity to make

good his promise, after failure to perform in time, and fails again after depriving the government of the use of its property for 13 months, so that it is obliged to take over the work, is not such a contingency precisely provided for in article 9. To adopt the interpretation contended for by defendant's counsel the government would be powerless to collect the amount agreed to be paid per day for failure to complete the work on the date agreed upon, if it should at any time terminate the right to further delay the completion of the work, no matter to what extent or for how long a period the contractor dragged the work along, whether for 13 months, as here, or for as many years. If the government terminated the contractor's right to proceed nothing could be collected under the contract, no matter what the damage to plaintiff for loss of use and occupancy of the building; plaintiff could recover only the additional cost of completing the unfinished job. If that meaning is to be read into the contract, under the state of facts here, the only way the plaintiff could have protected itself from damage would be to have ended the right of the contractor to proceed further on the date agreed upon for the completion of the work, the balance of article 9 for unliquidated damages at $25.00 per day would seem to be absolutely meaningless. This court may be in error, but it probably will not be long before the higher court will have an opportunity to correct it, at any rate, for the 9th Circuit. This court has given much thought to the principal question involved since the trial and after consideration of the able briefs filed by counsel, but has been unable to find sufficient reason to change the views expressed in the memorandum opinion written on overruling the defendant's Motion to Dismiss (39 Fed. Supp. 819), consequently the decision here will be in favor of the plaintiff with costs.

Findings of ultimate facts and conclusions will be submitted conformably to the foregoing views.

CHARLES N. PRAY, *Judge.*

Filed April 15, 1942.
C. R. GARLOW, *Clerk.*

In the District Court of the United States in and for the District of Montana

UNITED STATES OF AMERICA,
District of Montana, ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true, and correct copy of the decision of the court on the

merits, in case No. 203, *United States of America, Plaintiff*, vs. *John V. Grogan et al., Defendants*, as appears from the original thereof now remaining on file in my office as such Clerk, on file and of record in said Court.

Witness my hand and the seal of said court at Great Falls, Montana, this 18th day of September, A. D. 1943.

[SEAL]

C. R. GARLOW,
Clerk as aforesaid.
By C. G. KEGEL,
Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MONTANA

GREAT FALLS DIVISION

No. 203

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN V. GROGAN, AND AMERICAN SURETY COMPANY, A CORPORATION, DEFENDANTS

The defendant Surety Company in the above-entitled cause submits a motion to strike from the complaint all of paragraph XI thereof for the reason that the matters therein alleged are redundant and immaterial. To sustain the motion defendant cites article 9 of the construction contract pleaded as an exhibit in the complaint, and alleges that it is identical with a like numbered article 9 included in a certain construction contract construed by the Court of Claims of the United States in the case of *The Fidelity & Casualty Company of New York* v. *The United States*, 81 Court of Claims, 495, wherein the Court held: "In this case the principal's liability is fixed in the terms of the contract. Under article 9 above quoted both parties agreed upon failure of the Contractor to perform the work within the time fixed in the contract the Government had at its election two courses which it could pursue. The first was to terminate the contract and hold the Contractor and his surety for the excess costs of completion and actual damages suffered. The second course was to allow the Contractor to continue to perform the contract and to charge him liquidated damages for failure to deliver on time. The amount of this damage both parties had agreed in the contract would be a certain amount for each day completion was delayed from the time fixed for completion. The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the Contractor. The release of the principal from the liability released the surety." Therefore, in the instant case, the defendant surety claims that since the Government elected to complete the work and sustained damages, as alleged, in the sum

of $2,195.12, being the difference in cost between the contract price and the amount expended by the Government, the rule of the above-cited case would apply, and the Government would have no right to recover liquidated damages.

As another ground for the elimination of paragraph XI defendant cites *Clifton* v. *Willson*, 47 Mont. 305, claiming that under Montana law one seeking to recover liquidated damages must allege and prove facts indicated in sections 7556 and 7557 R. C. M. 1935. But in article 9 of the present contract the substance of the provisions of both sections of the statute above referred to, are embodied by agreement in the following language: "If the Government does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof."

Further allegations and proof of the facts where the parties themselves have agreed precisely in the terms of the statute would seem to be unnecessary. The case cited refers to a contract for liquidated damages, not including the exception contained in section 7557, which provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." But it must be remembered that this is not a suit between private parties, but a suit by the United States to enforce its contract in its own court in respect to its property rights and that the federal statutes and decisions would therefore control.

There is nothing in the complaint from which it might be inferred that the Contractor abandoned his contract, on the contrary it does appear that he was allowed to continue long after the date when he had agreed to complete the work. This would indicate that the Contractor continued under his contract, with the consent of the Government, after the expiration date of the contract, thereby becoming liable for the damage agreed upon for every day's delay after the expiration date.

The time for completion of the contract, after certain extensions had been granted, was June 20th, 1933. In paragraph VIII of the complaint it is alleged that the Contractor had not completed the contract on June 20th, 1933, and that he had not completed all of the work he was required to do under the contract on

July 20th, 1934, and that because of his breach, on July 20th, 1934, plaintiff notified the defendant Contractor, that his right to proceed further under the contract was terminated on that date. It seems apparent that no further delay could be permitted and consequently the Contractor and surety were notified on July 20th, 1934, that the right to proceed further under the contract was terminated. In view of these facts would not the Government under the contract have the right to claim the amount agreed upon for each day of delay from June 20th, 1933 to July 20th, 1934? The facts in this case are different from those appearing in the authority cited from the Court of Claims. In that case, on the date when the work was to have been completed, to wit: February 10th, 1932, the Government notified the Contractor that his right to proceed with the work was terminated in accordance with article 9 of the contract. The Contractor was not permitted to continue after that date and the Government took possession. The Government then entered into a new contract with the surety for the completion of the work, although not authorized so to do under the original contract, and no assignment had been made thereof by the Contractor to the surety. The Court there held that the liquidated damage clause could not have been revived except by changing the terms of the original contract, which provided that the Contractor should pay liquidated damages for each calendar day of delay until the work was completed or accepted, when he was allowed to continue after the date fixed for completion.

From a consideration of the facts in the two leading cases relied upon by counsel, this Court is not prepared to hold that they are greatly in conflict, and that the decisions cannot be reconciled. In the Court of Claims case the Government stopped the work on the date when it was to have been completed, but was not completed. Under that certain state of facts disclosed, having exercised one of the remedies it might be doubtful whether the other would be available. Here the Contractor was given opportunity to complete the work for thirteen months after the date agreed upon for completion, and allowed to remain in full control until the Government apparently was forced to take over the work to protect its own interests, with no prospect of the Contractor being able to perform his contract. In considering the last case cited by counsel for plaintiff. (*Continental Casualty Co.* v. *United States*, 29 Fed. Supp. 598; affirmed 113 Fed. (2) 294, C. C. A. 5.) it appears that the principal facts there are much like the facts in the present case, and it is evident that both Courts in construing paragraph 9 in that case, which is the same as paragraph 9 in this case, held in effect that the Government was accorded

two remedies, both of which could be exercised in a proper case and both of which were exercised in the case cited, as plaintiff is seeking to do in this case. If the Court were to hold to defendant's theory the Government would be deprived of recovering the amount agreed upon for delay after waiting for thirteen months after date of expiration for the Contractor to finish his work.

In the Court's opinion the motion to strike should be denied, and it is so ordered. In the event other pertinent authorities may be discovered by counsel, the question here may again be considered at the trial.

CHARLES N. PRAY, *Judge.*

Filed, July 22, 1941.
C. R. GARLOW, *Clerk.*

In the District Court of the United States in and for the District of Montana

UNITED STATES OF AMERICA,
District of Montana, ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct copy of the decision of the court on Defendant's Motion to Strike in case No. 203, *United States of America, Plaintiff*, vs. *John V. Grogan, et al., Defendants*, as appears from the original thereof now remaining on file in my office as such Clerk, on file and of record in said Court.

Witness my hand and the seal of said court at Great Falls, Montana, this 18th day of September, A. D. 1943.

[SEAL]

C. R. GARLOW,
Clerk as aforesaid.
By C. G. KEGEL.
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN SURETY COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above case on June 24, 1943.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana, overruling a

motion to strike certain portions of the complaint, is reported in 39 F. Supp. 819. Its opinion on the merits is reported in 44 F. Supp. 871. The opinion of the Circuit Court of Appeals (R. 94–98) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 98). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the provisions of Section 21 of the Act of June 6, 1902, and Article 9 of the standard form of Government construction contract, the United States may recover from the contractor or his surety liquidated damages for delay, computed at the specified rate, for the period between the stipulated completion date and the date upon which the United States terminated the contractor's right to proceed with the work on account of default.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Act of June 6, 1902 (40 U. S. C. § 269) and of the Government construction contract here involved are set forth in the Appendix, pp. 15–16.

STATEMENT

The facts, as disclosed by the record, may be summarized as follows:

On June 24, 1931, the United States of America, acting through the Treasury Department (R. 44), and one John V. Grogan entered into a contract requiring the latter to construct certain public buildings at the United States Inspection Station, Babb-Piegan, Montana (R. 77). Respondent, American Surety Company, became the surety on Grogan's bond to the United States, conditioned upon his faithful performance of the contract (R. 24–26, 77–78). The United States gave Grogan notice to proceed under the contract on July 8, 1931 (R. 78), thereby fixing March 4, 1932 as the completion date pursuant to Article 1 of the contract (R. 10). For causes considered to be excusable under Article 9 of the contract, the United States, at Grogan's request and with the consent of respondent, extended the time for completion of the contract to June 20, 1933 (R. 78). Grogan failed to complete the work by the extended date, and on July 20, 1934, the work still not having been completed, the United States terminated the contractor's right to proceed under the contract (R. 78–79). In the completion of the work, which at respondent's request was let by the United States to the lowest responsible bidder, the United States necessarily expended $2,044.04

more than it would have been required to expend had Grogan completed the work according to his contract (R. 79–80).

The United States brought suit in the District Court against Grogan and respondent to recover such excess costs and also to recover liquidated damages of $9,875 (R. 1–26). The latter item was based upon Article 9 of the contract and paragraph 5 of the specifications, requiring the contractor to pay the Government the sum of $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8, 78); and the liquidated damages were computed in the Government's complaint for the 395 days between June 20, 1933, the extended stipulated date of completion, and July 20, 1934, when the contractor's right to proceed was terminated (R. 8).

Grogan was not served and never appeared. The district court denied respondent's motion to strike from the complaint the paragraph which alleged a right to liquidated damages (R. 27–29; 39 F. Supp. 819), and after trial without a jury rendered judgment for the United States for $2,044.04 as excess costs of completion and $9,875 as liquidated damages for delay (R. 76–81). On appeal, the circuit court of appeals, acting by two judges (Circuit Judge Haney, who was

present at the argument, not participating in the decision), affirmed the judgment as to the excess cost but reversed as to the liquidated damages (R. 94–98).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Article 9 of the standard form of Government construction contract did not confer upon the United States the right to recover any liquidated damages if the Government terminated the contractor's right to proceed after the completion date fixed in the contract but prior to actual completion.

2. In failing to hold that Section 21 of the Act of June 6, 1902, and the long-established administrative practice of the Government under Article 9 of the standard form of Government construction contract, required that Article 9 be construed to entitle the United States to liquidated damages accruing between the contract completion date and the date of termination of the contractor's right to proceed.

3. In failing to hold that irrespective of Article 9 of the contract, the United States was entitled to recover liquidated damages in the amount of $9,875 by virtue of Section 21 of the Act of June 6, 1902, and paragraph 5 of the specifications.

4. In reversing the judgment of the District Court in respect of the award of liquidated damages.

REASONS FOR GRANTING THE WRIT

Section 21 of the Act of June 6, 1902 (Appendix, p. 15), requires that in all Government contracts for the construction of any public building under the control of the Treasury Department, "a stipulation shall be inserted for liquidated damages for delay," which shall be "conclusive and binding upon all parties." It provides that in all suits on such a contract or on "any bond given in connection therewith," it shall not be necessary for the United States "to prove actual or specific damages sustained by the Government by reason of delays." Paragraph 5 of the specifications made part of the contract here involved (Appendix, p. 16) binds the contractor to pay to the Government $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." Article 9 of the contract (Appendix, pp. 15–16), which appears in every standard form Government construction contract, provides that if the contractor refuses or fails to prosecute the work with diligence or to complete it within the contract time, the Government may terminate the contractor's right to proceed, prosecute the work to completion, and recover from the contractor and his sureties any excess cost occasioned the Government. It further provides that if the Government does not terminate the right of the contractor to proceed, he and his sureties shall be liable to the Government for the amount set forth

in the specifications, as liquidated damages, for each calendar day of delay until the work is completed or accepted.

The court below held the United States not entitled to recover liquidated damages in the instant case on the ground that Article 9 of the contract authorized liquidated damages only if the Government permitted the contractor to complete the work after the completion date fixed in the contract, and not where the Government terminated the contractor's right to proceed before the work was actually completed. It is believed that the court below has decided an important question involving a provision of a widely-used standard form Government construction contract, in a manner contrary to the purpose of the provision and of the statute requiring it, and also to the administrative interpretation.

1. Section 21 of the Act of June 6, 1902 (Appendix, p. 15), requiring that a stipulation "for liquidated damages for delay" be inserted in all Government contracts for the construction of any public building under the control of the Treasury Department, was enacted for the avowed purpose of permitting recovery by the Government not only of its actual damages, but also of damages for "the inconvenience to the public and the Government in being deprived of the use of the public building," an element of damage ordinarily impossible to prove in monetary terms. H. Rept. No. 1794, 57th

Cong., 1st Sess.; 35 Cong. Rec. 4835; see 3 Comp. Dec. 282. Article 9 of the contract and paragraph 5 of the specifications, providing for liquidated damages for each day's delay in completion, are in compliance with the mandate of the 1902 statute (see 4 Comp. Dec. 306, 308), and constitute "an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform." See *Robinson* v. *United States*, 261 U. S. 486, 488; cf. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

Article 9 of the contract requires the contractor or his sureties to pay the Government the amount set forth in the specifications ($25) "for each calendar day of delay until the work is completed or accepted," in lieu of actual damages for delay which the article recites "it will be impossible to determine."

Under Article 9, the liquidated damages become payable "if the Government does not terminate the right of the contractor to proceed," and the contractor continues the work. The Government did not exercise its right to terminate the contract on June 20, 1933, the stipulated completion date as extended, although the work was not then completed, and allowed the contractor to continue the work until July 20, 1934, when it terminated his right to proceed on account of noncompletion. It is in this situation that Article 9 calls for the accrual and payment of daily liquidated damages.

There is nothing in Article 9 or any other provision of the contract which operates to forfeit the Government's right to accrued liquidated damages if it later exercises its contractual power to terminate the contractor's right to proceed on account of default.[1] The court below held to the contrary by reading Article 9 as though it provided for liquidated damages only "if the Government *never* terminates" the contractor's right to proceed. This construction of Article 9 is certainly no more compelling semantically than that we suggest,[2] and the choice between the two renditions is made simple in the light of the practical effect of each and its relation to the Congressional objective. To interpret Article 9 as sanctioning the recovery of accrued liquidated damages up to the date of termination fully effectuates the prime purpose of the 1902 Act, to eliminate the uncertainties and dif-

[1] While Article 9 calls for the payment of liquidated damages "until the work is completed," the United States in this case does not seek recovery of liquidated damages beyond the date upon which the contractor's right to proceed with the work was terminated. Consequently this case raises no question as to the Government's right to liquidated damages beyond such date.

[2] To uphold the right to liquidated damages as they accrue, notwithstanding subsequent termination of the contractor's right to proceed, merely requires that the phrase in Article 9, "*if* the Government does not terminate the right of the contractor to proceed", be read "*so long as* the Government does not terminate" his right to proceed. Such an interpretation of the word "if" has judicial sanction where it results in a reasonable construction of a contract. Cf. *Firemen's Fund Ins. Co.* v. *Congregation Rodeph Sholom*, 80 Ill. 558, 559; *Campau* v. *Chene*, 1 Mich. 400, 413.

ficulties of establishing the actual damages to the Government caused by delay in obtaining the use of a public building—damages generally consisting of a public inconvenience not to be measured in monetary terms. Cf. *Wise* v. *United States*, 249 U. S. 361, 366; 3 Comp. Dec. 282.[3] Such has also been the interpretation given to Article 9 by the General Accounting Office, for in making final settlement with contractors whose right to proceed has been terminated on account of default, that Office always withholds all accrued liquidated damages not already deducted from the balance otherwise due to the contractor.[4]

On the other hand, the construction adopted below does violence to the purpose of the liquidated damage provision, and leaves it entirely to the contractor whether such damages will ever be paid. The contractor could evade payment of a substantial amount of accrued damages by merely abandoning the work at any point short of sub-

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[3] Contracts must be construed with reference to existing law (*Wilson* v. *Rousseau*, 4 How. 646, 685), which enters into and forms part of the contract. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5. The principle that ambiguous language in a contract is to be construed favorably to one of the parties—for example because he is a surety—must give way to the policy of the statute which required the contract. Cf. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 205.

[4] 8 Comp. Gen. 266; 10 Comp. Gen. 433, 437; 11 Comp. Gen. 81; 15 Comp. Gen. 123.

stantial completion; and he might be led to do so whenever he determines that the excess cost of completion, plus such actual damages from delay as the Government may be able to establish, will be less than the total liquidated damages.[5] To impose upon the Government the burden of establishing actual damages for delay despite the inclusion of the stipulation for liquidated damages nullifies the Congressional purpose in requiring such a provision. Moreover, the meaning given to Article 9 by the court below would require that liquidated damages deducted and withheld by Government fiscal officers from progress payments made to the contractor during his delayed performance be remitted if the Government should thereafter terminate the contractor's right to proceed. Since the head of the agency which awarded the contract would be the officer charged with the power of termination, the result reached below derogates substantially from the power conferred upon the Secretary of the Treasury by Section 21 of the 1902 Act "to remit the whole or any part" of liquidated damages "as in his discretion may be just and equitable" (see Appendix, p. 15).

2. Irrespective of Article 9, the United States was entitled to liquidated damages for the period between the stipulated completion date and the date when the contractor's right to proceed was terminated. The court below proceeded on the

[5] See Judge Madden's dissent in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 257–258.

assumption that Article 9 did not deal with a situation in which the contractor, although allowed to proceed after the stipulated completion date, was not permitted to complete the work. It concluded that the United States, because of its termination of the contractor's right to proceed in this instance, was remitted to its common law remedy for such actual damages caused by the delay as it was able to prove. But even on this interpretation of Article 9, the court's conclusion is erroneous. Entirely apart from Article 9, paragraph 5 of the specifications expressly obligated the contractor to pay the Government $25 liquidated damages "for each calendar day's delay in the completion of the contract." The 1902 statute which required that such a stipulation be included in the contract made it "conclusive and binding upon all parties," and provided that in suits arising thereunder it should be unnecessary for the United States "to prove actual or specific damages sustained * * * by reason of delays." The instant case falls foursquare within the ambit of the 1902 statute and of paragraph 5 of the specifications, entitling the United States to the liquidated damages accruing during the period of delayed performance.

3. The question is one of considerable importance. The interpretation of Article 9 of the standard form Government construction contract,

which was prepared by the Procurement Division of the Treasury Department, affects a very substantial part of all public construction and repair carried out by the United States, and all executive branches of the Government are required to use that form of contract unless specifically exempted by the Treasury Department. 41 Code of Federal Regulations §§ 11.1–11.3. The question of the right of the Government to recover or withhold liquidated damages from a contractor who continues performance after the stipulated completion date but fails to complete the work, is constantly arising, and the decisions of the lower courts are not in harmony.[8] Indeed, the General

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[8] The Court of Claims in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247 (Judges Whitaker and Madden dissenting), and the Court of Appeals for the District of Columbia in *United States* v. *Cunningham*, 125 F. (2d) 28, reached the same result as the court below under Article 9 of the standard form Government contract, although by different reasoning. In *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284, the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment allowing the United States to recover liquidated damages where the right to proceed was terminated after the contract completion date. That decision presents a conflict only in result, for the precise questions here involved were not presented to the court. However, provisions similar to Article 9, appearing in contracts between private parties, have been held to allow the owner to recover both excess costs and liquidated damages for delay, particularly where the contractor abandons after the time for completion has passed. *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2); *City of Reading*

Accounting Office has advised that until an authoritative ruling to the contrary is obtained from this Court that office will continue to assess and withhold liquidated damages accruing prior to termination of the contractor's right to proceed [1]—a position which will breed litigation until the question is put at rest.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

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v. *U. S. Fidelity & Guaranty Co.*, 19 F. Supp. 350 (E. D. Pa.); *Six Companies of California* v. *Joint Highway District No. 13*, 110 F. (2d) 620 (C. C. A. 9), reversed on other grounds, 311 U. S. 180.

[1] This appears in letters from the Assistant Comptroller General to the Department of Justice dated, respectively, January 7, 1942, and April 18, 1942.

APPENDIX

Section 21 of the Act of June 6, 1902, c. 1036, 32 Stat. 326 (40 U. S. C. § 269), provides:

> In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Article 9 of the standard form of Government construction contract provides in part:

> DELAYS—DAMAGES.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such

part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications of the contract here involved provides:

5. LIQUIDATED DAMAGES.—The contractor shall pay to the Government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract. (R. 8.)

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Miscellaneous:

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41 C. F. R. § 11.3 29
3 Comp. Dec. 282 ..... 12, 17
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN SURETY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (R. 104–107) overruling a motion to strike that portion of the complaint claiming liquidated damages for delay in the completion of the contract (R. 27; cf. R. 8, par. XI) is reported in 39 F. Supp. 819. The final opinion of the District Court, dealing also principally with the question of liquidated damages (R. 100–102), is reported in 44 F. Supp. 871. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 94–98) is reported in 136 F. (2d) 437.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 98). The petition for writ of certiorari was filed on September 24, 1943, and was granted November 8, 1943 (R. 108). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the provisions of Section 21 of the Act of June 6, 1902, paragraph 5 of the specifications, expressly made a part of the contract here involved, and Article 9 of that contract (a standard form of Government construction contract), the United States, where it allowed the contractor to proceed after the stipulated date for the completion of a public building, may recover from the contractor or his surety liquidated damages for delay, embracing the period between the agreed completion date and the date upon which the United States subsequently terminated the contractor's right to proceed with the work on account of his continuing default.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Act of June 6, 1902, c. 1036, 32 Stat. 310, 326 (40 U. S. C. 269) and of the Government construction contract here involved are set forth in the Appendix, *infra* pp. 32–33.

STATEMENT

On June 24, 1931, the United States, acting through the Treasury Department, and one John V. Grogan entered into a contract requiring the latter to construct certain public buildings at the United States Inspection Station, Babb-Piegan, Montana (R. 9–22, 77). Respondent, American Surety Company, became the surety on Grogan's bond to the United States, conditioned upon his faithful performance of the contract (R. 24–26, 77–78). The United States gave Grogan notice to proceed on July 8, 1931 (R. 78), thereby fixing March 4, 1932, as the completion date pursuant to Article 1 of the contract (R. 10). The United States, at Grogan's request and with the consent of respondent, extended the time for completion of the contract to June 20, 1933, for causes considered to be excusable under Article 9 of the contract (R. 78; see also R. 16). Grogan failed to complete the work by the extended date, but the Government allowed him to continue with the construction. On July 20, 1934, thirteen months later, the work still had not been completed, and the United States, pursuant to its authority under Article 9 of the contract, terminated the contractor's right to proceed with the work because of his continuing default (R. 78–79). At respondent's request, a contract for the completion of the work, after advertising, was let by the United States to the lowest responsible

bidder (R. 79). The United States, as the result of the contractor's non-completion of the building, expended $2,044.04 more than it would have been required to expend had Grogan completed the work (R. 79–80).

The United States brought suit against Grogan and respondent in the district court to recover such excess cost and also to recover liquidated damages of $9,875 for the delay occasioned by the contractor's default (R. 1–26). The latter item grew out of Article 9 of the contract (Appendix pp. 32–33) and paragraph 5 of the specifications, attached to and made a part of the contract, paragraph 5 stipulating for payment by the contractor to the Government of $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8, 10, 16, 78). The liquidated damages were computed for the 395 days between June 20, 1933, the extended date for completion, and July 20, 1934, when the contract right to proceed was terminated (R. 8, 80).

Grogan was not served and never appeared (R. 100). The district court denied respondent's motion to strike from the complaint the paragraph which alleged a right to liquidated damages (R. 27–29, 104–107, 39 F. Supp. 819; see also R. 100–102, 44 F. Supp. 871), and after a trial without a jury rendered judgment for the United States for $2,044.04 as excess cost of completion and $9,875 as liquidated damages for delay (R. 76–84).

On appeal, the circuit court of appeals, acting by two judges,[1] affirmed the judgment as to the excess cost but reversed as to the liquidated damages (R. 94–98).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that Article 9 of the standard form of Government construction contract did not confer upon the United States the right to recover any liquidated damages where the Government terminated the contractor's right to proceed after the completion date fixed in the contract but prior to actual completion.

2. In failing to hold that Section 21 of the Act of June 6, 1902, and the long-established administrative practice of the Government under Article 9 of the standard form of Government construction contract, required that Article 9 be construed to entitle the United States to liquidated damages accruing between the contract completion date and the date of termination of the contractor's right to proceed.

3. In failing to hold that irrespective of Article 9 of the contract, the United States was entitled to recover liquidated damages in the amount of $9,875 by virtue of Section 21 of the Act of June 6, 1902, and paragraph 5 of the specifications.

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[1] Circuit Judge Haney, who was present at the argument, did not participate in the decision (R. 94, 98).

4. In reversing the judgment of the district court in respect of the award of liquidated damages.

SUMMARY OF ARGUMENT

I. Damages caused by the failure of a construction contractor to complete a building within the time agreed are not usually demonstrable in terms of dollars and cents, and liquidated damages are a familiar means of compensating for such delay. Recognizing that fact, Section 21 of the Act of June 6, 1902, requires that all contracts for the construction of any public building under the control of the Treasury Department shall contain a stipulation calling for liquidated damages for delay in completion. Pursuant to this statutory command, paragraph 5 of the specifications, specifically made a part of the contract in the instant case, and Article 9 of that contract provided for such liquidated damages.

The statute makes the stipulations for liquidated damages conclusive and binding upon the parties and renders proof of actual damage unnecessary. These considerations the Circuit Court of Appeals disregarded in ruling that, under Article 9, the Government is not entitled to liquidated damages for delay where it permits the contractor to attempt a tardy completion of construction but thereafter terminates the contractor's right to proceed before final completion because of his continuing default.

Paragraph 5 of the specifications, expressly made a part of the contract, categorically requires, in response to the Congressional mandate, that the contractor pay a stipulated amount as "fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." It should, of course, be read with Article 9, and being a provision indigenous to the particular contract here involved, it may well be dispositive as against the more general language of Article 9, a general standard form contract provision. But it is unnecessary to rest upon this ground since Article 9 was likewise undoubtedly intended to be responsive to the Congressional directive and may properly, we believe, be so construed as to accord with the legislative objective.

II. While Article 9 provides for the payment of liquidated damages "*if* the Government does not terminate the right of the contractor to proceed," it is not necessary to interpret this as though it read "if the Government *never* terminates" the contractor's right to proceed. A permissible construction, and one more harmonious with the statutory intent, is to construe "if" as establishing a continuing condition with substantially the same meaning as "so long as." So read, Article 9 would require the payment of liquidated damages for every day of delay until the Government terminates the contractor's right to proceed, thus preventing the forfeiture of liquidated damages already ac-

crued. This interpretation is consistent with the well established administrative application of Article 9 by the General Accounting Office.

The construction adopted by the Circuit Court of Appeals would place the Government at the mercy of the contractor, who may avoid substantial liquidated damages simply by refusing further performance, thereby provoking termination. This gives the contractor an election as to the damages he may be required to pay which the contract does not contemplate. The liquidated damage provision, far from being a stimulant of performance, as it was intended to be, becomes a deterrent in just those instances where the delay has been the most vexatious and the accrued liquidated damages most substantial.

The remedies provided by Article 9 cannot be considered exclusive of each other. Where someone other than the original defaulting contractor completes, both the excess cost of such completion and liquidated damages for the delay are necessary, if the Government is to be fully compensated for the contractor's default.

Even if resort to implication is necessary, Article 9 should be construed so as to realize the statutory policy which it was designed to implement. And the construction for which we contend, while sustainable, we believe, under Article 9 considered alone, becomes compelling when it is considered with paragraph 5 of the specifications and with Section 21 of the 1902 Act.

ARGUMENT

INTRODUCTION

Section 21 of the Act of June 6, 1902 (Appendix, p. 32,) provides that "In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay." In compliance with this statutory command, the contract here involved, which called for the construction of public buildings under the control of the Treasury Department, contained stipulations for liquidated damages for delay in paragraph 5 of the specifications, and in Article 9 of the contract (see Appendix, pp. 32–33).

Section 21 of the 1902 Act makes explicit provision for the effect to be given to such a stipulation. It states that "in all suits * * *, on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." (Appendix, p. 32.) Nevertheless, the Circuit Court of Appeals held that the United States was not entitled to the stipulated damages for the contractor's delay in completing the work but could recover only "such

actual damages for the delay as it might be able to prove" (R. 96).[3]

This result the court felt was required by the wording of Article 9 of the contract, which it thought permitted the recovery of liquidated damages only "where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance (R. 96)."

While Article 9, if rigidly construed, may be susceptible of that construction, we believe it properly is to be read to authorize liquidated damages wherever the Government permits the contractor to proceed beyond the stipulated completion date but thereafter terminates his right to proceed, because of continuing default, before actual completion. The latter construction, we submit, would best serve the statutory purpose underlying Article 9; narrower interpretation would permit frustration of the Congressional purpose by inartistic drafting of a contractual provision intended to comply with an unequivocal statutory mandate.

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[3] The Government did not in the trial court assert or make any effort to establish actual damages for the delay, relying on the liquidated damage provisions of the contract, and the district court sustained this reliance. Presumably the reversal in the Circuit Court of Appeals as to liquidated damages was not intended to bar the Government upon the remand of the case pursuant to its judgment from asserting and establishing a claim for actual damages for delay if it possesses proof.

Article 9 should also be read in conjunction with paragraph 5 of the specifications, forming likewise a part of and framed particularly for the contract here involved, which specifically required that the contractor pay a specified sum as liquidated damages for each day's delay in the completion of his contract.

I

The Provisions of the Contract as a Whole, Read in the Light of the 1902 Act, Should Be Construed so as to Require the Contractor To Pay Liquidated Damages for Each Day He Delays Completion of His Contract

It is a familiar fact that the damages to an owner caused by failure of a construction contractor to complete a building within the time agreed, are often not demonstrable in terms of dollars and cents, primarily because there is usually no opportunity to test by experience the actual occupation or rental value of the structure or improvement being erected.[3] Consequently, a stipulation for liquidated damages as the agreed measure of the compensation payable for delay almost invariably appears in construction contracts, and has been judicially enforced, as compensatory and not as a penalty, at least since the

[3] This is particularly true, of course, in the case of a public structure.

turn of the century.[4] Section 21 of the Act of June 6, 1902, requiring that such a stipulation be included in all Government contracts for the construction or repair of public buildings and public works under the control of the Treasury Department, precludes any possibility of treating the damages as a penalty. The enactment was for the avowed purpose of providing a ready means of promoting prompt performance, and of compensating for "the inconvenience to the public and the Government in being deprived of the use of the public building"—an element of damage ordinarily impossible to prove in monetary terms. And, since "the moving consideration for the acceptance of a particular bid" may often be "the time within which the bidder agrees to complete the work," so that "the Government buys time," Congress considered it not unfair to require the contractor to pay not only "the actual damages sustained by the United States" but also an additional liquidated amount for the Government's loss of the contemplated use of the public building. H. Rep. No. 1794 (57th Cong., 1st sess.), p. 8; 35 Cong. Rec. 4835; 3 Comp. Dec. 282. As a clear statutory mandate, this statute enters into and

[4] *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 669; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119; *Hathaway & Co.* v. *United States*, 249 U. S. 460, 464; *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 225–226.

forms a part of all construction contracts under the control of the Treasury Department. *Robinson* v. *United States*, 57 C. Cls. 7, 22, affirmed, 261 U. S. 486; 4 Comp. Gen. 306, 308; cf. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Northern Pac. Ry.* v. *Wall*, 241 U. S. 87, 91–92, *Russell Co.* v. *United States*, 261 U. S. 514, 524.

It is, however, unnecessary to discuss here the effect of the statute upon a Government contract from which the directed stipulation for liquidated damages is missing, since in the instant contract such a stipulation appears twice: in paragraph 5 of the specifications to the contract, expressly made a part of the contract (R. 8, 10, 31), and again in Article 9 of the contract. As "an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform,"[2] these provisions were designed and intended to fulfill the obligation imposed by the 1902 Act (cf. 4 Comp. Gen. 306, 308). They should be construed accordingly.

The Circuit Court of Appeals rested its decision solely upon a construction of Article 9 of the contract. It did not advert to paragraph 5 of the specifications. The latter, however, is equally

[2] See *Robinson* v. *United States*, 261 U. S. 486, 488; cf. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

a part of the contract, was specifically set out in the Government's complaint in a separate paragraph (XI) as the basis of its claim for liquidated damages (R. 8), and was treated as vital by respondent through the interposition of a motion to strike Paragraph XI (R. 27) which was extensively argued by it and became the subject of a written opinion by the trial court (R. 104–107). Paragraph 5 of the specifications (R. 8) is a provision which was fashioned for the particular contract here involved and not a standard form provision prescribed for general use, like Article 9, the standard liquidated damage provision. Paragraph 5 specifically provides that "The contractor shall pay to the government the amount of Twenty-five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8). This categorical requirement for liquidated damages patently was sufficient to cover the situation of a contractor who, like respondent's principal, essayed to carry the work to a tardy completion, but was unable to finish the job with reasonable promptness, a situation which the Circuit Court of Appeals recognized as one which "might well have been, but was not," in its opinion, covered by Article 9 (R. 96). That article certainly must be read in conjunction with paragraph 5 of the specifications; indeed, the latter provision, drafted particularly for the instant

contract, may well control over the more general language of the standard form provision. However, we do not think it necessary to rest our case on this ground alone, for we believe that Article 9, considered in the light of the purpose of the 1902 Act, to which it was intended to be responsive, should properly be construed to carry out the Congressional objective.

II

Article 9 of the Contract Authorizes Recovery of Liquidated Damages for Delay Even Where the Work is Completed by Someone Other Than the Contractor

Article 9 of the contract provides that if the contractor refuses or fails to prosecute the work with proper diligence or to complete it within the contract time, the Government may terminate the contractor's right to proceed, prosecute the work to completion, and recover from the contractor and his sureties any excess cost occasioned the Government thereby. But it also provides that "If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is com-

pleted or accepted the amount as set forth in the specifications * * *."

The contractor in this case did not abandon construction nor did the Government terminate his right to proceed with the work on or before the stipulated completion date. Instead, the contractor, with the Government's permission, essayed to complete the construction, and it is not denied that the Government was justified in terminating his right to proceed when some thirteen months later he had still not finished the work.

But the Circuit Court of Appeals read Article 9 as affording the Government liquidated damages only where it allows the contractor to continue to completion, no matter how long completion may be delayed. In that court's view, if the Government at any time after the agreed completion date terminates the contractor's right to proceed, however justifiedly, liquidated damages may not be recovered. In short, the court read Article 9 as though it provides for liquidated damages only "if the Government *never* terminates" the contractor's right to proceed. As a matter of semantics, this construction is certainly no more compelling than to read the phrase "*if* the Government does not terminate" the contractor's right to proceed, as establishing a continuing condition, under which liquidated damages will accrue "*so long as* the Government does not terminate" it. *Campou* v. *Chene,* 1

Mich. 400, 413 (1850). Thus if a will provided that an estate pay $100 a month to W if she does not marry, the normal understanding would be that W would receive the amount stated for as long as she did not marry, and that if she married she would not be obligated to repay the amounts received beforehand.

As the diversity of judicial opinion in this and prior litigation (*Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 256, 257) makes manifest, the liquidated damage provision of Article 9 is ambiguous in so far as it bears on the present question. Hence, that interpretation must be preferred which will best serve the policy of the underlying statute. Cf. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 205.[6] It is only by interpreting Article 9 as sanctioning the recovery of accrued liquidated damages up to the date of termination that the prime purpose of the 1902 Act is fully effectuated—the elimination of the uncertainties and difficulties of establishing the actual damages caused to the Government by delay in obtaining the use of a public building.[7] This situation the Circuit Court of Appeals recognized, but thought itself powerless to meet by reason of the wording of Article 9 (R. 96).

No barrier is opposed to such interpretation by the language requiring payment of liquidated

[6] The statute enters into and forms part of the contract. See p. 12–13, *supra*.

[7] Cf. *Wise* v. *United States*, 249 U. S. 361, 366; 3 Comp. Dec. 282.

damages for each calendar day of delay "until the work is completed or accepted." That language was intended undoubtedly to delineate merely the ultimate date of the contractor's liability. It certainly was not designed to throw an obstacle in the way of the Government's unquestioned contract right to put an end to the contractor's right to proceed when it becomes apparent that delivery of the building will be unreasonably delayed. That phrase should therefore be deemed to be not definitive but merely an explanation of what may be the full measure of the contractor's liability for liquidated damages, a lesser amount being recoverable where the Government cannot appropriately tolerate further delay in the completion of the building.[8] Such a construction conforms to the accepted view of similar stipulations, under which the courts hold that the right to liquidated damages accrues from day to day as the delay in completion continues (*Louisville & N. R. Co.* v. *Mason & Hoge Co.*, 126 Ky. 844, 853), and that since the agreed completion date fixes the time as of which liquidated damages begin to accrue, damages run forward from that date. *Southern Pa-*

[8] The United States in this case does not seek recovery of liquidated damages beyond the date upon which the contractor's right to proceed with the work was terminated. Consequently, there is no need to consider the Government's right, if any, to liquidated damages beyond such date.

cific Co. v. *Globe Indemnity Co.*, 21 F. (2d) 288, 291 (C. C. A. 2); *Texas & St. L. Ry. Co.* v. *Rust*, 19 Fed. 239, 245 (C. C. E. D. Ark.); *Consolidated Cut Stone Co.* v. *Seidenbach*, 181 Okla. 578, 588.

Moreover, the consistent administrative application of Article 9—a standard provision in almost every Government construction contract[9]—accords with this view. The interpretation uniformly followed in final settlements with contractors by the General Accounting Office is that the claim for liquidated damages is not forfeited by a subsequent termination of the right to proceed. That office always withholds, or takes appropriate action to collect, all accrued liquidated damages not already deducted from the balance otherwise due to the contractor. See 8 Comp. Gen. 266; 10 Comp. Gen. 433; 11 Comp. Gen. 81; 15 Comp. Gen 913. Where, as not infrequently occurs, liquidated damages have been deducted as they accrue from the progress payments to the contractor, the effect of the construction adopted by the court below will be to require the Government to pay these amounts back whenever the contractor delays long enough to compel the termination of his contract.[10]

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[9] See footnote 20, *infra*, pp. 29–30.

[10] This problem is presented in several cases now pending. E. g.: *Modern Industrial Bank* v. *United States*, Court of Claims No. 45602 (awaiting decision).

The meaning assigned to Article 9 by the Circuit Court of Appeals, that liquidated damages are available only where the Government allows the delinquent contractor to continue to delayed completion, is open to several objections. Foremost is that it requires proof of "actual damages for the delay" where termination takes place before completion, in the teeth of Section 21 of the 1902 Act, which expressly dispenses with such proof in suits on a construction contract containing a stipulation "for liquidated damages for delay." This either attributes to the draftsmen of Article 9 (the Treasury Department, 41 C. F. R. § 11.1) an intention to disobey the explicit direction of Congress by leaving the Government unprotected in a large number of cases, because of the difficulty of proof of actual damages, or penalizes the Government for unintentional ambiguities in language which, however inartistically drafted, properly read, effectuates the Congressional objectives. Termination of a contractor's right to proceed after the stipulated completion date has passed is a frequent occurrence in cases of default, particularly since an earlier termination would often depend upon an appraisal, speculative in character, that a reasonably prompt completion was not likely. Since a situation so likely to occur could not well be a *casus omissus*,[11] a construction

[11] The court below attached some weight to the fact that the liquidated damage provision would not be operative in

whereby the liquidated damage clause would be dispositive of so readily foreseeable an eventuality should be preferred over one that has it largely fail of its objective.

The view adopted by the Circuit Court of Appeals has the additional vice of leaving it entirely to the contractor whether liquidated damages will ever be paid, although under the contract the choice as to whether the contractor should be allowed to proceed past the agreed completion date, the factor which brings the liquidated damage provision into play, rests with the Government. A contractor, of course, will not have to pay liquidated damages where the Government terminates his right to proceed prior to the stipulated completion date. And, in the only circumstance in which he might be called upon to pay such damages—where the Government has let him

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all cases of inexcusable delays by the contractor, such as where the Government terminates his right to proceed before the completion date is reached (R. 96). But there is a rational basis for not stipulating for liquidated damages in such a situation, while reserving liquidated damages where termination occurs after the completion date. In the former situation, the extent to which the contractor's delays prior to termination caused delay in completion is always conjectural and involves controversial issues of fact including such matters as the diligence with which a new contractor finishes the work (cf. *School Dist.* v. *DeLano*, 96 Kan. 499; *Village of Canton* v. *Globe Indemnity Co.*, 201 App. Div. 820); in the latter case, the extent of the delay attributable to the contractor is readily demonstrable up to the time of termination.

continue beyond the agreed date—he can relieve himself of liability for accrued liquidated damages at any time short of completion simply by abandoning the work, or provoking the Government into a termination of his right to proceed.[12] He would be able to follow that course when it seemed to his advantage, i. e., whenever he concluded that the accrued liquidated damage would be greater than those damages which are permitted under the decision of the Circuit Court of Appeals, the excess cost of completion plus provable damage from his delay. (See Madden, J., dissenting in *Maryland Casualty Co.* v. *United States,* 93 C. Cls. 247, 257–258).

Additionally, if the view of the Circuit Court of Appeals were accepted, Government contracting

[12] As Judge Madden stated in his dissenting opinion in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 258:

"So long, however, as the work is left in the hands of the contractor, the delay in completion is his sole responsibility, and there is no reason why he should escape the agreed remedy for it by the easy expedient of prolonging it to a time when the Government, needing the facilities contracted for must take over and complete the work. If this becomes the established doctrine, the practice of the Government, often advantageous to both parties, of refraining from taking over the work even though it seems certain that it will not be completed on time, in the hope that the contractor, spurred by the liquidated-damages clause, will bend every effort toward a completion as soon as possible after the time, will no longer be prudent, since the contractor can often serve his interests better by doing nothing and thus compelling the Government to take over the work and forfeit the liquidated damages already accrued than by proceeding diligently."

officers would be induced to allow a contractor to proceed to completion despite inexcusable delays so as not to forfeit the mounting liquidated damages, whereas the public desideratum is, assuredly, prompt completion and occupancy of needed structures. An interpretation conducive to such results defeats the purposes of the clause: the contractor may elect the damages he shall pay in a situation where he should not have the right of choice; the Government is put to the burden of proving the actual damages if it is to recover from the contractor for the delay in completing a public building, a difficult and often insuperable burden of which the 1902 Act declared it should be relieved; and the liquidated damages provision, instead of being a stimulant of performance (cf. *Robinson* v. *United States*, 261 U. S. 486, 488), has the opposite tendency in just those instances when the delay has been most protracted and vexatious. Madden, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 257–258; 52 Harv. L. Rev. 160, 161; 35 Ill. L. Rev. 74, 76. In the interpretation of a provision so cloudy in meaning as Article 9 that construction should be adopted which favors the public interest. Restatement of Contracts, Sec. 236 (f).

The interpretation of Article 9 for which the Government contends is fair both to the Government and to the contractor. If the contractor is permitted to proceed after the agreed completion

date, in the expectation that he can finish his job with reasonable promptness, he is given the opportunity to see that the cost of performance to the Government is not increased, thus minimizing any actual damages he might be called upon to pay, as well as avoiding that impairment of his reputation as a contractor which may flow from the denial of such an opportunity. For the Government's forbearance, it is only appropriate that he should pay the agreed damage for the public's inconvenience, so long as it is expedient to extend forbearance. Of course the amount of liquidated damages for which the contractor may be held ultimately responsible is always within his control, since by appropriate diligence in completing the project he can avoid or lessen the total damages payable. Moreover, all contractors are treated alike under the Government's construction, whereas the interpretation of the Circuit Court of Appeals gives a preference to the contractor who, it turns out, should not have been given the opportunity to make good his default.

It has been suggested [12] that Article 9 provides alternative and mutually exclusive contractual remedies—liquidated damages if the contractor is

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[12] This was the construction given Article 9 by *United States* v. *Cunningham*, 125 F. (2d) 28 (App. D. C.), and by a majority of the Court of Claims in *Maryland Casualty Co.*

allowed to continue to completion and excess cost if he is not. But these remedies should not be so treated, since they have regard to different and unrelated items of damage arising at different times, and since resort to either alone would leave uncompensated injuries. See Madden, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 258; *Bacigalupi* v. *Phoenix Bldg. Co.*, 14 Cal. App. 632, 637–638; 18 Comp. Dec. 599.

Excess costs have no necessary relation to delayed completion,[14] and may be recovered under

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v. *United States*, 93 C. Cls. 247. There are no other decisions directly in point. Other Court of Claims decisions cited by the Circuit Court of Appeals in its opinion in this case (R. 97) did not involve situations in which the contractor's right to proceed was terminated after the stipulated completion date. In *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284 (C. C. A. 5), affirming 29 F. Supp. 598 (E. D. La.), certiorari denied, 311 U. S. 696, the Circuit Court of Appeals affirmed a judgment allowing liquidated damages and excess costs in completing a contract terminated by the Government after the completion date. However, the precise questions here involved were not presented to the court.

[14] Liability for excess cost is included in the standard form contracts to enable the Government to recover amounts expended in good faith to complete the contract and thus eliminate reasonableness of the outlays as a possible issue. *Baer* v. *Sleicher*, 153 Fed. 129 (C. C. A. 6); *Massachusetts Bonding & Ins. Co.* v. *John R. Thompson Co.*, 88 F. (2d) 825 (C. C. A. 8), certiorari denied, 301 U. S. 707. In the absence of a special provision the excess cost could not be recovered at all if the contractor were dispossessed before the completion date. *Stone & Gravel Co.* v. *United States*, 234 U. S. 270, 277–280; *United States* v. *O'Brien*, 220 U. S. 321, 327.

Article 9 even where the work is completed by a successor by the stipulated date, as recognized by the Circuit Court of Appeals (R. 97–98). To recover the additional costs of completion still leaves the Government uncompensated for deprivation of the use of its building. The separability of these items of damage has been recognized by other courts in construing provisions similar to Article 9 in contracts between private parties, and the more recent trend has been to allow both excess cost and liquidated damages for delay, particularly when the contractor abandons after the time set for completion has passed.[18]

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[18] *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2); *Six Companies* v. *Joint Highway Dist. No. 13*, 110 F. (2d) 620 (C. C. A. 9); *Bankers Surety Co.* v. *Elkhorn River Drainage District*, 214 Fed. 342, 347 (C. C. A. 8); *City of Reading* v. *United States Fidelity & Guaranty Co.*, 19 F. Supp. 350 (E. D. Pa.); *General Supply & Const. Co.* v. *Goelet*, 241 N. Y. 28 (1925); *Comey* v. *United Surety Co.*, 160 App. Div. 698 (1914), affirmed, 217 N. Y. 268; *McKegney* v. *Illinois Surety Co.*, 180 App. Div. 507 (1917); *Clemente Construction Corp.* v. *Cox Contr. Co.*, 172 N. Y. Misc. 904 (1939); *School District* v. *DeLano*, 96 Kan. 499 (1915); *National Loan and Exchange Bank* v. *Gustafson*, 157 S. C. 221, 230 (1930). There is some diversity in the state cases on the right to liquidated damages in case of abandonment, but "the better opinion" supported by substantially all of the more recent cases (cited *supra*) allows recovery. McCormick, *Damages* (1935), p. 619; *Applicability of Liquidated Damages Clause to Delays Where Building Contractor Abandons*, 35 Ill. Law Rev. 74 (1940). There is a statement to the contrary in 3 Williston, *Contracts* (Rev. Ed.), p. 2210, but no supporting reasons are advanced,

The decision below makes the Government's termination of the contractor's right to proceed, however justified, a reason for forfeiting the accrued liquidated damages. But such termination has no relevance to the damages caused by delay; for, as was said in *General Supply & Const. Co.* v. *Goelet*, 241 N. Y. 28, 36-38, in allowing liquidated damages for delay even where the owner unlawfully terminated the contract:

> When the contractor was put off the work, the owner had suffered damage by the failure of the contractor to complete eight months before, during which time the owner

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and the statement has been frequently criticized and the few authorities cited distinguished. See *Southern Pacific Co.* v. *Globe Indemnity Co.*, *Six Companies* v. *Joint Highway Dist. No. 13* and *Clemente Construction Corp.* v. *Cox Contr. Co.*, 35 Ill. Law Rev. 74, and McCormick, all cited *supra*, and 32 Harv. Law Rev. 160, 161. In the *Southern Pacific* case, after referring to Williston, the Second Circuit declared (21 F. (2d), at 291):

"A close examination of the cases, however, does not in our opinion establish such a rule, and we can see no justification for it, at least when the contractor abandons after the time for completion has passed. In such a case some part of the liquidated damages has accrued before the repudiation. No intelligible reason has been suggested why the owner should lose his right to them because of subsequent repudiation."

The *Clemente* opinion reviews the leading authorities and concludes, 172 N. Y. Misc., at 910 (quoting from 32 Harv. Law. Rev. 161): "The older view, then, is anomalous in that the more flagrant the breach and the greater the likelihood of delay, the more difficult it will be for the owner to recover for the delay he was guarding against."

> lost the use of the building. Nothing the contractor was prevented from doing or could possibly do would wipe out the damage.

There is "no intelligible reason" why the Government should lose its right to accrued liquidated damages merely because the contractor's default is sufficiently flagrant to justify if not require termination.[16] *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288, 291 (C. C. A. 2); see also Whitaker, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 256–257. Such forfeiture is not explicable on the ground that the Government has an election whether or not to terminate, as the court below fallaciously assumes (R. 96); for termination will be required wherever the contractor refuses to proceed, as Article 9 recognizes, and where progress may be so disappointing that no practical course of action other than termination is available to the Government.[17]

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[16] The Government did not terminate the contract. It merely terminated the contractor's right to proceed. *United States* v. *Continental Casualty Co.*, 29 F. Supp. 598, 602 (E. D. La.), affirmed, 113 F. (2d) 284 (C. C. A. 5), certiorari denied, 311 U. S. 696. Compare Walker-Smith and Close, *The Standard Form of Building Contract* (1939), p. 80. No reason why termination of the right to proceed should prejudice accrued liquidated damages is discerned.

[17] The record is silent as to the reason for the termination in the case at bar. Its justification was not denied below.

That the construction for which we contend requires some implications from the express language of Article 9 was a formidable objection to the Circuit Court of Appeals.[18] But Article 9 was included, as already stated, in compliance with a statute which evinces the congressional concern that liquidated damages for delay be stipulated in construction contracts, and the statute would consequently fill any interstices in the liquidated damages clause in the present contract, if they were not already filled by paragraph 5 of the specifications. *United States* v. *Ellicott*, 223 U. S. 524. Since Article 9 was designed to fulfill the obligation imposed by Section 21, and since there is no doubt of Congress' objective,[19] the contract should be construed as an adequate realization of the statutory policy.[20] *Personal Industrial Bank-*

[18] "Inability of the Government to make the necessary proof [of actual damages for delay] affords no justification for stretching the agreement to fit the Government's necessities" (R. 96).

[19] There is no need for the court which sees what the draftsmen of Article 9 were "driving at" to conclude here that they "have not said it." Cf. Mr. Justice Holmes in *Johnson* v. *United States*, 163 Fed. 30, 32 (C. C. A. 1); *Burstein* v. *U. S. Lines Co.*, 134 F. (2d) 89, 93 (C. C. A. 2).

[20] The same article appears in all Government construction contracts unless a deviation is authorized. 41 C. F. R. § 11.3; 9 Comp. Gen. 406. The Procurement Division of the Treasury Department evidently regarded Article 9 as it stands as satisfying the requirements of the Act of June 6,

ers, Inc. v. *Citizens Budget Co.*, 80 F. (2d) 327, 328 (C. C. A. 6), certiorari denied, 298 U. S. 674; *United States* v. *Lewin*, 29 F. Supp. 512, 514 (N. D. Cal.). To deny the Government liquidated damages in the present circumstances would leave the United States with no other safe remedy at the stipulated completion date "than the abrogation of the contract and the reletting of the same," contrary to the purpose of Section 21 of the 1902 Act. H. Rep. No. 1794, 57th Cong., 1st sess., p. 8. There should be no objection to giving the word "if" in Article 9, its possible meaning of "so long as," for "where the whole context * * * demonstrates a particular intent * * * to effect a certain object, some degree of implication may be called in to aid that intent." *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, quoting from *Durousseau* v. *United States*, 6 Cranch 307.

CONCLUSION

It is respectfully submitted that the decision below, in so far as it denies liquidated damages against respondent for the contractor's delay in the performance of the contract until termination of his right to proceed, is erroneous and

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1902, and therefore considered reference to the Act unnecessary. That being the case, Section 21 is a reliable guide to the interpretation of the liquidated damages clause, regardless of the executive department that controls the contract.

should be reversed, with the result that the judgment of the district court should be affirmed in its entirety.

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FEBRUARY 1944.

APPENDIX

Section 21 of the Act of June 6, 1902, c. 1036, 32 Stat. 310, 326 (40 U. S. C. § 269), provides:

> In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Article 9 of the standard form of Government construction contract provides in part (R. 15–16):

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate

his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications of the contract here involved, expressly made a part thereof, provides (R. 8):

> Liquidated Damages.—The contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract.

U. S. GOVERNMENT PRINTING OFFICE, 1944

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN SURETY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

This reply memorandum is submitted because of a contention raised by respondent which was not considered in the Government's main brief. Reference will also be made to several other statements in respondent's brief.

1. Respondent has argued in Point I of its brief that the Government failed to prove a cause of action because it failed to show that the work performed by the contractor who replaced Grogan was work required under the contract with Grogan. The contention is that the record is silent as to this, and that the burden of proof rested on the Government as plaintiff.

This point had been unsuccessfully urged by the respondent in the district court (R. 43, 48, 67), in

the course of objections to evidence, without any express indication one way or the other whether it was intended to apply to the Government's claim for liquidated damages as distinct from the claim for excess costs. After the judgment of the district court in favor of the Government in both respects, respondent appealed to the circuit court of appeals. Its Statement of Points on which it intended to rely (R. 91–92) and the Specification of Errors in its brief were not explicit in this connection. But respondent's briefs in the court below argued the point only as a defense to the claim for $2,044.04 excess costs. The circuit court of appeals treated the point only in this connection, and decided that issue against respondent (R. 98). Since respondent did not petition for certiorari, we assumed that the point was no longer in the case.

Respondent had, we believe, good reason for pressing the point only in relation to the excess costs. It would be obviously improper to charge respondent or its principals for the cost of "completion" if the work performed by the new contractor did not conform to that called for in the original contract. But there would be no causal relationship between the amount of liquidated damages accruing *before the termination of the original contract* (which is what we are concerned with here) and any change in the work performed by the new contractor thereafter.

We can concede, however, for present purposes, that the Government would have had no cause of action even for the liquidated damages if it appeared that after terminating Grogan's right to proceed it had changed its mind about completing the Grogan contract and had turned the unfinished building into a radically different structure. In this case the evidence shows the contrary, as both the district court and the circuit court of appeals found. Moreover if, as respondent argues, the record had been silent on the point, the burden of proof would not have rested on the Government.

The district court found as a fact (R. 79):

> That because of the failure of the said defendant, John V. Grogan, to perform his contract, as he was required to do, and to complete the work which he had promised and agreed to complete within the time specified in said contract and granted by the plaintiff, it became necessary for the plaintiff to cause *the said work to be completed* and performed, and at the request of the defendant, American Surety Company, a Corporation, the plaintiff advertised for bids for doing and completing the said work, and let the contract *for completing the said work* to the lowest, responsible bidder. [Italics supplied.]

The court further found that the Government (R. 79)

> * * * was required to, and did, necessarily lay out and expend the sum of $2,-

> 044.04 more in causing *the said work* to be done * * *. [Italics supplied.]

The circuit court of appeals found the evidence sufficient to support these findings (R. 97).

The specifications for the original contract with Grogan and the new contract were not introduced in evidence by either party. The Government proved, however, that when the Grogan contract was terminated the contracting officer for the Government notified respondent, as surety, and asked whether respondent desired "to complete the work as surety on the contractor's bond" (R. 41–42). Respondent replied (R. 42–43):

> that this Company as surety on the contractor's bond does not desire to complete the work. We therefore request that bids be obtained and the contract awarded to the lowest bidder.

The Treasury then advertised for bids "for completion of construction of the United States Inspection Station at Babb-Piegan, Montana" (R. 44–45), and the work was so described in the contract ultimately made (R. 50).

The only reasonable inference to be drawn from this evidence, in the absence of anything more, would be that the new contract was to complete the project begun by Grogan. That was what respondent had been invited to do, and the manner in which the work was described in the new contract indicated that that was what was contemplated. Certainly the trial court was not "clearly

erroneous" (Rule 52 (a)) in reaching this conclusion from the facts before it, in the absence of any contrary evidence.

And even if the record at that stage does not definitely establish that the projects were the same, it certainly was sufficient to shift to respondent the burden of proving that they were not. For the proof that Grogan's rights to complete the Inspection Station had been terminated and that the new contract was for the "completion of the construction of the Inspection Station" at the very least raised a presumption that the new contract was for the completion of the job covered by the Grogan contract.

Furthermore, if there had been no proof at all with respect to whether the work finally done conformed to the original specifications, the nature of the issue is such that it would have been for respondent to establish by way of affirmative defense. The Government made out a *prima facie* case for liquidated damages up to the date of termination when it showed that Grogan was permitted to work beyond the completion date, the date of termination, and perhaps, in general, that the project was completed. It was for respondent then to raise the issue that the final specifications did not sufficiently conform to the original ones. Although we have been able to find no cases involving the burden of proof in this precise situation it has been held that the burden is on a defendant to prove that the cost

of completion of a contract by a plaintiff in similar circumstances is unreasonable, and that in the absence of evidence as to reasonableness the plaintiff may recover the amount actually spent. *Mayor* v. *Second Avenue R. R. Co.*, 102 N. Y. 572, 577, 7 N. E. 905 (1886); *Bacigalupi* v. *Phoenix Building & Construction Co.*, 14 Cal. App. 632, 637, 112 Pac. 892 (1910). That situation is closely analogous to the case at bar. None of the cases cited by respondent (Br. pp. 7–8) is even remotely concerned with the burden of proof;[1] in each case there were evidence and findings as to the difference between the original and the final specifications, and no issue as to burden of proof was presented.

Respondent now seeks to make up for the failure of its counsel below to introduce the specifications in evidence[2] by asking this Court to take judicial notice of the contract specifications and progress reports (Br. p. 8). The reference to this material in respondent's brief (p. 9n) does not prove that the final specifications differed from the original ones. But in any event records as to the performance of a particular public building project in the files of a department of the Government are not judicially noticeable.[3]

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[1] *California Bridge & Construction Co.* v. *United States*, 50 C. Cls. 40, affirmed, 245 U. S. 337; *Pacific Coast Construction Co.* v. *United States*, 53 C. Cls. 382; *Patrick Corr & Sons* v. *United States*, 55 C. Cls. 7.

[2] The records were available at the trial (R. 34, 36).

[3] The cases cited by respondent (p. 8, n. 11) do not deal with material at all comparable.

2. Respondent contends (Br. pp. 19–23) that in four out of "six delay situations" the liquidated damages clause concededly does not apply. Analysis of the "four" situations referred to indicates that they consist only of two, and that each of these has the same good reason for not coming within the purview of the liquidated damages clause.

The first three of respondent's "situations" (Br. pp. 20–21) cite cases in which the contractor's right to proceed was terminated on or prior to the day fixed for completion. This is the precise situation with respect to which the contract permits the Government to recover only excess costs. It is true that the Government may also suffer damage for delay when the right to proceed is terminated before or on the completion date. But from the time of the termination, the contractor no longer has control of the construction; accordingly it is not within his power to determine how long the delay shall be. This will depend upon the speed with which the Government moves in arranging for completion by another contractor and upon the speed with which the new contractor completes the work. The reason for not bringing this situation within the liquidated damages clause is not that there will be uncertainty as to the amount of damages for delay, which is the reason for liquidated damages, but uncertainty as to the extent to which the contractor is responsible for the delay. It is reasonable to draw the line at a point which will avoid

controversy, as to whether the Government has proceeded with adequate expedition to mitigate the damages caused by the contractor's delay.

The fourth of the "situations" (Respondent's Br. p. 22) relates to the period between the termination of the contract and actual completion where, as here, the termination does not occur until after the date specified for completion. The Government has not claimed damages for this period. Obviously the basis for this is the same as in the cases just described, for, regardless of when termination occurs, the same reasons indicate the inadvisability of holding a contractor liable for subsequent delays over which he has no control.

But the same considerations which warrant freedom from liquidated damages for the period after termination of the right to proceed, whether termination occurs before or after the fixed date for completion, equally require that liquidated damages be paid for the period that the contractor continues with the work after the fixed completion date. During this period, the liquidated damage provision acts as an incentive for him to finish the job as quickly as possible and thus minimize the Government's damages. *Robinson* v. *United States*, 261 U. S. 486, 488. It is immaterial in so far as these considerations are concerned whether he subsequently finishes the work himself or not. For he is only being charged

liquidated damages for the period that the construction is under his control.

3. Respondent declares (Br. p. 18) that petitioner "is in error in stating that Article 9 'appears in all government construction contracts unless a deviation is authorized' ". In support of this statement respondent refers to various decisions and to regulations with respect to contracts made by several departments of the Government. But these decisions antedate the standard form contracts, while the regulations cited are of recent vintage, having been made pursuant to executive authorization in accordance with the First War Powers Act (55 Stat. 838, 50 U. S. C. 611) permitting departures from ordinary contracting procedure. The form of contract here in issue was U. S. Standard Form No. 23 construction contract, approved by the President November 19, 1926, and used between 1926 and 1935, during which period the Bureau of the Budget, working through the Inter-departmental Board of Contracts and Adjustments, prescribed standard forms and requested that all Government agencies use them unless deviations were authorized by the Director of the Bureau of the Budget.[4] After 1935 the same standard form was

[4] Monteith and Burack, *Methods and Procedure in Federal Purchasing* (1933), p. 172–173. Eighteen standard purchase and contract forms were prescribed in this way during 1926, including the standard form No. 23 here involved and the equally well known U. S. Standard Form No. 32 supply contract referred to by respondent. See also 17 Comp. Gen. 700, 708. The current revision of these contracts is printed in 41 C. F. R. 12.23 and 12.32.

prescribed by the Procurement Division, Treasury Department, with the approval of the Secretary of the Treasury, pursuant to Executive Order under the Reorganization Act and subsequent Regulations approved by the President.[5] Deviations must be authorized by the Director of Procurement with the approval of the Secretary of the Treasury.[6] This procedure remained in effect until recently when war conditions necessitated a departure from the previous strict requirements. Thus, from 1926 until the beginning of the war, the standard form of contract here in suit was in use throughout the government.

Respondents also deny our statement that there has been a "consistent administrative construction" of Article 9 of the standard contract in accordance with our present position. The opinions of the Comptroller of the Treasury and the Comptroller General relied upon by respondent for this statement, however, do not deal with Article 9 of Standard Form No. 23 here in ques-

[5] See Section 1 of Executive Order 6166 of June 10, 1933 (5 U. S. C., following § 132), reorganizing the functions of procurement in accordance with the Act of June 30, 1932, c. 314, secs. 401–409, 47 Stat. 413–414, as amended (5 U. S. C. 124–132), and regulations approved by the President on April 12, 1935 (41 C. F. R. 11.1–11.3).

[6] See 41 C. F. R. 11.3. Respondent is thus in error in stating (Br. p. 14) that "since 1933, the several agencies have pursued independent courses and no attempt has been made by the Budget Bureau to require uniformity." Cf. e. g., 10 C. F. R. 81.4 and 81.16 (c), relating to War Dept. contracts prior to the emergency.

tion, but with other contracts used in an earlier period. In view of respondent's frequent references to War Department regulations (Br. pp. 16–17) it should be noted that the War Department interpreted the liquidated damages clause precisely in accordance with the government's position here. See 10 C. F. R. 81.19 (e).

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 381.

UNITED STATES OF AMERICA, *Petitioner*,

v.

AMERICAN SURETY COMPANY, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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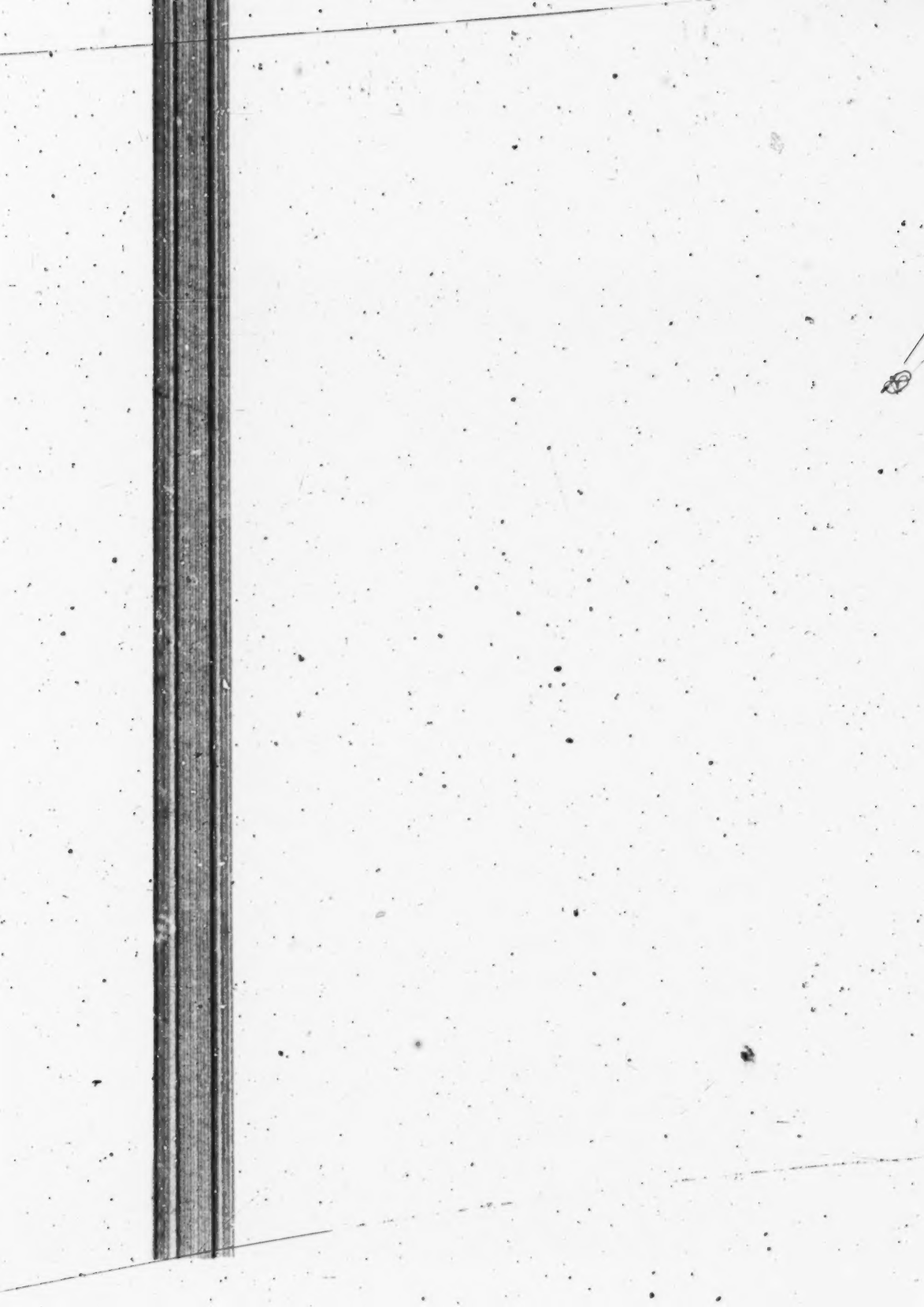

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Respondent opposes the petition for a writ of certiorari not only upon the ground that the decision of the Circuit Court of Appeals is a correct statement of the applicable law, but also for the reason that, under the rules and decisions of this Court, the instant case is not a proper one for the issuance of the writ. An understanding of the litigation will settle that the case involved here is not of general concern or public importance but that it involves

a question of interest only to the parties litigant. It will settle further that there is nothing but a simple question of contract interpretation involved and that the lower court has not only followed precedents in its decision that are found in the uniform decisions of the Federal courts but has construed plain language to mean what it says.

Petitioner's stated grounds for the issuance of the writ are limited to the contention (Page 7 of Petition) that the court below has decided an important question involving a provision of a widely-used standard form Government construction contract (a) in a manner contrary to the purpose of the provision and (b) of the statute requiring it, and also (c) to the administrative interpretation. Actually the statute mentioned is not involved at all in this litigation as will be pointed out later herein. The administrative interpretation of the contract is rather beside the point and has been for a long time as it is not in accordance with the language of the contract as the Federal courts have been holding uniformly for years. Consequently, the only ground upon which the Government in fact hinges its petition for the writ herein is that the court below has decided what Government counsel calls an important question. It will be plain from a consideration of the record that the real reason for the petition here is that Petitioner's counsel desires another hearing and that no question of importance is involved at all.

ARGUMENT.

(1) The Decision of the Circuit Court of Appeals Involves Only the Construction of the Language of a Contract and is Correct Under the Plain Contract Language and Constructions Thereof by the Federal Courts in Other Litigation Involving the Same Contract Form.

The Circuit Court of Appeals in its decision here involved has tersely said:

> "The inquiry (here) relates merely to the reach of a special stipulation agreed upon as a substitute for the ordinary mode of proving damages. By its very nature a stipulation for liquidated damages has no force save in the contingency made the subject of the special agreement. (Citing 15 Am. Jur., Damages, Paragraph 261, and Wise v. U. S., 249 U. S. 361.) To extend the stipulation to other contingencies by a process of reasoning or by analogy would amount to a rewriting of the contract."

Then the Circuit Court of Appeals said:

> "In what contingency, then, is delay here made compensable by the exaction of the stipulated sum? The sole contingency specified is 'if the Government does not terminate the right of the contractor to proceed'. The situation contemplated—or at any rate agreed upon—is one where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance. In that event only, it was agreed a specific sum was recoverable in lieu of the damages actually sustained but thought incapable of proof. What the trial court did was to extend the agreement to a different situation, one in which it might well have been, but was not, agreed that the stipulation should govern."

Now the Government, through certiorari, would attempt to re-argue the simple question presented below, and this, too, in face of the fact that the Federal courts of the country which have had occasion to pass upon this form of con-

tract in other litigation are all in harmony and have uniformly construed the contract heretofore as did the Circuit Court of Appeals in the instant case. See the following authorities in this connection:

Fidelity Casualty Co. of N. Y. v. *United States*, 81 Ct. Cls. 495;
Maryland Casualty Co. v. *United States*, 93 Ct. Cls. 247;
Commercial Casualty Insurance Co. v. *United States*, 83 Ct. Cls. 367;
American Employer's Insurance Co. of Boston v. *United States*, 91 Ct. Cls. 231;
United States v. *Cunningham*, 125 F. 2d 28; 75 U. S. App. D. C. 95.

There are no cases to the contrary; and counsel for the Government err in the statement in the petition here (page 13) that the decisions of the lower courts are not in harmony. As to the Continental Casualty Co. case, mentioned by the Government (page 13), counsel for the Respondent in the case at bar certifies that he has personally examined the entire record that was before the Circuit Court of Appeals for the Fifth Circuit, and the point of contract construction involved here was not raised by the parties or determined there. The Government now concedes as much in its petition. Hence the case creates no lack of harmony in the decisions. The other cases mentioned by the Government are not apposite as the contract provisions considered are entirely different from the provision involved here.

What public importance can be attached to a question of simple contract construction? And in view of the uniform construction through the years by the Federal courts, supra, of the particular contract provision involved here, the question ceases to have any possible importance now in any event. The Government has heretofore accepted the construction placed upon this particular contract form in the above-cited cases in the Federal courts in that it did

not apply for certiorari to have them reviewed. What possible justification can be found for the application now for certiorari in the last of a line of uniform decisions when the earlier decisions were not questioned? If a question of construction of the plain language of a plain contract is to become an important question justifying certiorari, there will be no end to the litigation this Court will be petitioned to review. In the Magnum Import case (262 U. S. 159, 67 L. Ed. 922) this court said:

> "The jurisdiction to bring up cases by certiorari from the circuit court of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Federal courts of appeal and the Court of Claims of the United States are in accord on the construction to be given to this particular form of contract. If the Government does not now like the construction that has been placed by the courts upon this contract form, it can change the language of the form so as to make it all inclusive hereafter. Certainly this condition does not give rise to a question of importance which it is in the public interest to have decided by this Court.

---

(2) No Question of Federal Law or of Federal Statutory Construction is Involved Here.

As one of its specifications of error herein (page 5 of Petition), the Government urges that the court below erred in failing to hold that Section 21 of the Act of June 6, 1902,

and the long-established administrative practice of the Government under the contract article involved in this litigation required that such contract article be construed as the Government contends.

The statute mentioned is quoted in the appendix to the petition for the writ. So far as pertinent here it provides only that contracts entered into with the United States for the construction of public work, etc., shall contain a stipulation "for liquidated damages for delay." The statute does not specify what language shall be used nor that the contract drawn shall meet the claims of the Government in this case. Acting under that statute the form of contract here involved was drafted. It provides "for liquidated damages for delay", and the requirements of the statute were thus met. The fact that the contract by its plain terms and as construed by the courts does not extend to giving the Government liquidated damages where it terminates the right of the contractor to proceed thereunder and completes the contract work itself does not bring the statute into the case. The fault, if any there be, is in the language of the contract which the draftsman used. Therefore, it is plain that this specification of errors is without merit. The same argument applies to paragraph 3 of the specification of errors herein.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated at Billings, Montana, October 11th, 1943.

STERLING M. WOOD,
Attorney for Respondent.

DOUGLAS, OBEAR & CAMPBELL,
Washington, D. C.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

AMERICAN SURETY COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

HOMER CUMMINGS,
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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

AMERICAN SURETY COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The brief for the United States correctly states the proceedings below.

JURISDICTION.

The brief for the United States correctly states the jurisdiction of this Court.

QUESTIONS PRESENTED.

(1) Whether petitioner, as plaintiff in a suit for damages for alleged non-completion of a contract, is not required to show that the alleged completion which it claimed it was required to secure elsewhere was for the same work

required of the defendant's principal under the original contract.

(2) Whether—under a contract expressly providing that, "if the Government does not terminate the right of the contractor to proceed", he shall pay per diem damages "for each calendar day of delay until the work is completed"—a contractor may, nevertheless, where the Government does terminate his right to proceed, be held liable for per diem damages for the period from the date fixed for completion to the date of such termination.

CONTRACT PROVISIONS AND VALIDATING STATUTE.

Article 9 of contract here involved (R. 15-16):

> If the contractor * * * fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work * * * In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications (R. 8):

> The contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and

liquidated damages for each calendar day's delay in the completion of the contract.

Statute validating liquidated damage stipulations:

> In all contracts entered into with the United States for the construction * * * of any public building or public work under the control of the Treasury Department,* a stipulation shall be inserted for liquidated damages for delay; and * * * such stipulation for liquidated damages shall be conclusive and binding upon all parties. [Sec. 21, Act of June 6, 1902, 32 Stat. 326, 40 U. S. C. § 269.]

STATEMENT.

The brief for the United States correctly sets forth facts of record.

SUMMARY OF ARGUMENT.

Petitioner has recovered excess costs and certain expenses occasioned by the delay. If in addition and despite a contrary construction running back at least forty-four years (26 Comp. Dec. 736, 737-738) contracting officers desire per diem damages, their remedy is to change the contract form as they are authorized to do. For two reasons petitioner should not now prevail:

I. Petitioner has failed to plead or prove, as required by the decisions of this Court and the Court of Claims, that the completion upon which it was insisting and which it was allegedly required to secure elsewhere was for the work required of defendant's principal under the contract.

II. The statute here involved validates "such stipulation" as the parties may make, but it does not supply contract provisions. The specifications of the contract here

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* The functions of the Public Buildings Branch of the Procurement Division of the Treasury Department were transferred to the Federal Works Agency pursuant to the Reorganization Act of 1939. See note 22 *infra*.

involved supply the rate, but not the application, of per diem damages. From the earliest times to date Government contracting officers have written different forms of contract, omitting per diem damages or making them variously applicable, and all present contracting regulations permit or require the elimination of such provisions. The Comptroller's rulings to the contrary are not consistent. Under Article 9 of the form here involved there are at least six delay situations—in one all parties agree that the per diem damages apply, in four they admittedly do not apply, and in the situation here presented all courts other than the trial court below have agreed that they do not apply. Petitioner's position is doubly inconsistent —for petitioner must construe away both the clause "if the Government does not terminate the right of the contractor to proceed" and other supporting language as well as the phrase "until the work is completed or accepted." The assumed facts and equities upon which petitioner bases its case are untenable in fact and, on the contrary, the equities lie with the respondent because petitioner, in reliance upon its reservation of right to judge the facts of compliance, has refused to show that the "completion" it insisted upon was for work required of respondent's principal and because by its own long delay petitioner has permitted a 20% penalty to accrue where it was required to, and could, mitigate the damages.

ARGUMENT.

This Court has not heretofore had presented to it the theory upon which this case was tried, and petitioner's brief on the merits treats of a suppositious case and imagined equities. [1]

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[1] Respondent may, in addition to supporting the grounds stated by the court below, insist upon matters overlooked or ignored by it. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435; *Central Kentucky Nat. Gas Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 269, 275; *Langnes* v. *Green*, 282 U. S. 531, 539; *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, 560; *United States*

There are three types of damages in delay situations. Not only has the petitioner here recovered stipulated excess costs and expenses,[2] but it has been the sole judge of the facts as to what construction was required and, on that ground, has been permitted to refuse to plead or prove that its "completion" contract was for the same work specified under the original contract here sued upon.[3] Petitioner's present contention is that the recovery of excess costs is insufficient[4] and that proof of actual damage involves too great a burden.[5] If there were any such need,

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v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330. And, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *Helvering* v. *Gowran*, 302 U. S. 238, 245.

[2] The contract expressly provides in Article 9 that, if the Federal Works Agency terminates for delay, it "may take over the work and prosecute the same to completion * * * and the * * * sureties shall be liable to the Government for any excess cost occasioned the Government thereby" (R. 16). The Government in this case sued to recover excess construction costs, engineering expenses, and inspection fees (Complaint, Par. IX, R. 6-7), proved the construction payments allowed by the trial court (R. 67-73), and received engineering and inspection expenses upon agreement of counsel in open court (R. 73-74).

[3] Article 15 of the contract provides that "all disputes concerning questions of fact * * * shall be decided by the contracting officer * * * whose decisions shall be final and conclusive upon the parties" (R. 19). Respondent contended below that the Government was required to show that the new contract under which the work was completed was the same as the one upon which the Government was predicating liability. However, the Government contended, and the court below held, that the decision of the contracting officer, under the above-quoted provision, was conclusive (R. 97). *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393.

[4] Petitioner's position is that recovery of excess costs "still leaves the Government uncompensated" for the delay (Br. 25-26). It intimates that it has been deprived of the use of the building, which is not shown to have been the fact here. It cites a supposed "recent trend * * * to allow both excess cost and liquidated damages for delay" in non-federal contract cases, but those situations are governed by the terms of the individual contracts involved.

[5] Petitioner's complaint is that it is "put to the burden of proving the actual damages" (Br. 23). But the applicable rule "is not changed by the difficulty suggested that it might be impracticable to prove actual damages." *United States* v. *United Engineering Co.*, 234 U. S. 236, 243. It mentions that, as is not shown to be the case here, it may for the period of delay lose the use of the building (Br. 17, 26); but then its measure of actual damage is clearly the rental value or the cost of substituted facilities. 18 Comp. Gen. 483. While petitioner here seeks per diem damages, it is of course obvious that in another case such liquidated damages may be insufficient and actual damages may be preferred (16 Comp. Gen. 277) as was the case in *Stone & Gravel Co.* v. *United States*, 234 U. S. 270, 279 *et seq.* See also *United States* v. *United Engineering Co.*, 234 U. S. 236, 242. Where the Government itself causes delay, it has allowed no such damages for the benefit of the contractor. *Cf. United States* v. *Rice*, 317 U. S. 61; *Wood* v. *United States*, 258 U. S. 120.

contracting officers—and not law or accounting officers—may supply the deficiency by a few strokes of the pen. They have deliberately chosen not to do so. Law, equity, and governmental practice all deny the claims now made by counsel for petitioner.

I. Petitioner failed to state or prove a cause of action because it failed to plead or show that the "completion" upon which it insisted was for work required under the contract with respondent's principal.

Petitioner as plaintiff in the trial court was required to show, as an indispensable part of its cause of action, that the completion upon which it was insisting was for the same work for which the original contractor and surety were bound.[6] Respondent made due objection.[7] The court below

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[6] As petitioner stated in its brief below, "the ordinary procedure is by comparing the specifications of the original contract, and the inventory of the state of work thereunder when the Government took over, with the specifications for completion" (Br. 37-38). See: *United States* v. *McMullen*, 222 U. S. 460, 472; *United States* v. *Axman*, 234 U. S. 36, 45; *United States* v. *Stone, Sand & Gravel Co.*, 177 F. 321, 326-327; *United States* v. *Perth Amboy Shipbuilding & E. Co.*, 137 F. 685; *United States* v. *Grosjean*, 184 F. 593, 595.

[7] In drawing its complaint, petitioner refrained from pleading the entire contract, omitting the all-important specifications (R. 9-22). But, since it relied upon one paragraph of the specifications for its claim of liquidated damages, it pleaded that paragraph alone in the body of its complaint (par. XI, R. 8). Respondent moved to strike the single paragraph so pleaded but the motion was denied (R. 27-29, 104-107). When the case came on for trial, respondent objected to the introduction of any evidence upon the ground that the complaint failed to state a claim "upon which any relief can be granted" (R. 34, 36). Respondent at the same time objected to the proof offered by the petitioner, on the ground that the new contract for the "completion" of the work was not shown to be "in accordance with the specifications and plans of [the original] Grogan contract" (R. 43), that "no proof or sufficient foundation has been laid or established that the Government was proposing [when it let the so-called contract for "completion"] to complete the Babb-Piegan Station in accordance with the plans and specifications and contract with Grogan" (R. 48), and that no foundation had been laid or proof made "that the work done, or the payment made for it was for the purpose of completing the Grogan contract in accordance with the plans and specifications * * * of the Grogan contract" (R. 67). Petitioner rested without proving more than the two contracts, without specifications, and the amounts paid or claimed, whereupon respondent moved to dismiss the suit upon the ground that "upon the facts and the law the plaintiff has shown no right to relief" (R. 74-75). Respondent, in its appeal to the court below, specified as error that the pleadings and evidence in no event warranted liquidated damages and that there was a complete failure of proof to support the judgment as a whole (R. 91).

considered the point so far as excess costs were concerned (R. 97), but not as bearing upon liability for per diem damages as well.

Petitioner as claimant had the burden, and respondent declined to assume it. Petitioner was in full possession of the evidence. "The Government must show that the work was done by another contractor under a contract and specifications which did not materially or substantially depart from the old contract and specifications." *California Bridge & Con. Co.* v. *United States*, 50 C. Cls. 40, 65, affirmed 245 U. S. 337, 344-345, on the ground that, in the absence of such showing, it would be "highly inequitable that the claim of liquidated damages should be allowed."[8] Subsequently, on the same ground, recovery by the contractor has been permitted as to retained percentages on a dam construction contract (*Pacific Coast Construction Co.* v. *United States*, 53 C. Cls. 582, 590)[9] and as to per diem dam-

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[8] As shown by the record in that proceeding, the contract read as follows: "12. *Deductions for delay.*—In case the completion of the work shall be delayed beyond the time fixed upon for the completion of the contract, deductions of $25 per day as liquidated damages during such delay may in the discretion of the Secretary of the Navy be made from the contract price of said work." (R. 9). That provision thus eliminated the question of construction here presented, because it provided, without reference to termination or non-termination, that per diem damages should accrue for delay "beyond the time fixed" and "during such delay". To the contractor's claim, the Government filed a counterclaim asking both excess costs and per diem damages—the latter being sought for three periods, from the agreed completion date to the end of an extension, from the latter date to the date the contract was annulled by the Government, and from the latter date to the date of actual completion by a successor contractor (R. 21). The Court of Claims rejected the counterclaim for per diem damages (R. 57-58), from which the United States took an appeal to this Court in which it argued for the allowance of the claimed per diem damages (Gov't Br. 6, 9-10) and claimed that there were no changes made in the relet contract sufficient to discharge the liability of the original contractor (*id.* 15-22). The plaintiff argued that the contracts were substantially different (Bridge Co. Br. 45-50).

[9] There the contract, as appears from the record in the Court of Claims, provided as follows: "21. *Delays.*— * * * In case the contractor should fail to complete the work in the time agreed upon in the contract, or in such extra time as may have been allowed for delays as herein provided, the engineer shall compute and appraise the direct damages for the loss sustained by the United States on account of further employment of engineers, inspectors, and other employees, including all disbursements on the engineering account, properly chargeable to the work. The amount so appraised and computed is hereby agreed upon as liquidated damages, and shall be deducted from any

ages claimed under a supply contract (*Patrick Carr and Sons* v. *United States*, 55 C. Cls. 7, 30-31).[10]

This salutary rule is particularly applicable where, as here, the contracting officers are the judges as to the facts of performance. Throughout its brief petitioner assumes that the contractor was responsible for the delay. Nowhere in the record is there any justification for such an assumption. The record is silent and, if petitioner is put to its proof or if this Court will take judicial notice of the official records, it will appear that petitioner was neither deprived of the use of the premises, since the building was substantially completed and actually occupied,[11] nor that its

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money due to the contractor under his contract, and the contractor and sureties shall be liable for any excess. * * *" (R. 43-44.) It should be noted that there the Government did not stipulate for per diem damages but merely for certain expenses. Also, in case the contract was terminated by the Government for delay, Article 22 provided that "any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor." (R. 44-45.) Upon the basis of the foregoing two provisions, the Government counterclaimed for some $40,000 liquidated damages and $315,000 excess costs (R. 40, 389).

[10] Here, as shown by the record in the Court of Claims, the contract provided that "one-tenth of one percentum of the contract price of such article shall be deducted for each day's delay, as liquidated damages for the delay, until satisfactory delivery or performance shall have been made, or until such time as the Panama Canal may reasonably procure a similar article elsewhere." (R. 14.) "In all cases where the Panama Canal, by reason of any default on the part of the Contractor, purchases similar articles elsewhere, the difference in costs, together with any additional expense incurred by the Panama Canal in replacing such articles, in addition to liquidated damages for delay until delivery of the articles purchased elsewhere is made, or until such time as, in the opinion of the General Purchasing Officer of the Panama Canal, such articles might reasonably have been delivered, may be collected by the Panama Canal from the Contractor or his sureties." (R. 14-15.) It should be noted that this form of contract eliminates the question of construction here presented, because it provides that the liquidated damages shall accrue "until satisfactory delivery or performance shall have been made, or until such time as the Panama Canal may reasonably procure a similar article elsewhere" and "until delivery of the articles purchased elsewhere is made * * * or * * * might reasonably have been delivered."

[11] The contract specifications and progress reports are matters of official record, of which it is submitted this Court may take judicial notice: *Jones* v. *United States*, 137 U. S. 202, 216; *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *Fletcher* v. *Jones*, 105 F. 2d 58, 61-62, cert. denied 308 U. S. 555; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 312. Respondent's file contains progress reports showing 97% completion on September 1, 1932. In the following month completion was reported at 98.7%, and the time of completion was extended to November 14, 1932, indicating that there was about two weeks' work left to do. On the following February 2, 1933, the Treasury terminated the contract,

second contract was in fact one for the completion of the work required under the first.[12]

The record shows that, upon the amended contract price of $53,891.00 (R. 4, 77), the original contractor had been paid $49,602.50 (R. 74). Since there were charges of delay, the contracting officers were required to retain 10% of all progress payments, or $4,960.25, and the $49,602.50 figure must therefore represent but 90% of what had been done. Otherwise the contracting officers would under the contract have had to find, contrary to petitioner's contentions now, that "satisfactory progress is being made" (R. 20). Therefore, the original contractor must have done a total of $54,562.75 worth of officially approved work, whereas the total contract price including additions was only $53,891.00

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but the following May 19 the termination was revoked and the time for completion extended to June 18, 1933. On September 1, 1933, the Station was occupied. Two months later the Government representative prepared a list of claimed uncompleted items. The following spring a notice was received from the Treasury that it proposed to secure bids in June 1934 for completing the work, but it was not until July 20, 1934 that it terminated the Grogan contract and proceeded to secure the Lancaster contract.

[12] The specifications of the so-called "completion" contract, which the Government refused to plead or prove, required performance in 60 days (¶ 3). Only $10 a day liquidated damages were specified (¶ 4) as compared with the $25 per day in the original or Grogan contract (R. 8). The "completion" contract required such typical things as laying linoleum on certain floors (¶ 32-40) and raising the chimney of the janitor's cabin (¶ 41). Rough edges were to be removed in the boiler room wall (¶ 49), the concrete sill of the basement entrance door was to be repaired (¶ 50), a fuel feed groove in the basement floor was to be cleaned and filled (¶ 51), the basement floor was to be ground down to permit caps of fuel oil tanks to be sunk to floor level (¶ 51), some chinking in the log walls of the garage and other buildings was to be replaced (¶ 52), wood floors were to be cleaned and resurfaced (¶ 56), "rustic wood trim" was to be installed to cover outlet boxes of four office lighting fixtures (¶ 57), hardware was to be adjusted and one doorknob replaced (¶ 73), all walls were to be cleaned and repainted (¶ 78), weather stripping was to be installed (¶ 133), plated pipe and a tumbler and tooth brush holder were to be installed in the janitor's cabin (¶144, ¶145), the gasoline pump was to be adjusted (¶ 152), a scoop shovel was to be furnished (¶ 153), nickel plated brass elbows were to be substituted for "unfinished" elbows in the fire hose racks (¶ 157), a steam trap was to be installed in the boiler room (¶ 158), certain electrical equipment was to be made automatic (¶ 159), electric storage batteries etc. were to be supplied (¶ 162), small maintenance tools were to be furnished (¶ 166); and the cause of faulty fuel supply for the electric plant was to be found and remedied by "the installation of * * * auxiliary piping and equipment * * * or other satisfactory method" (¶ 171).

(R. 4, 77).[13] This state of the record illustrates the necessity of the rule requiring the petitioner, as plaintiff or claimant, to show what completion it was insisting upon as a part of its case for per diem damages. Having failed to do so, it has failed to prove its cause of action.

II. The solely applicable per diem damage provision of the contract, by its express and unambiguous terms, does not apply in this case.

Petitioner's asserted basis of liability shifts from the statute, to the mere specifications, to the terms of the contract, and back to the statute again. Only the stipulation of the parties, as embodied in Article 9 of the contract, is here involved.

The statute.—The statute cited by the Government does not provide liquidated damages but merely validates stipulations of the parties therefor. Article 9 stipulates the recovery of the amount of excess costs incurred, plus certain other expenses, all of which have been recovered here and fully satisfy the statutory direction. The purpose of the statute, as its legislative history shows, was to avoid the rule which both authorized the disallowance of

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[13] Article 16 (b) of the contract provides that 10% "shall" be retained on all progress payments except that, as to the last 50% of the work if the contracting officer "finds that satisfactory progress is being made," progress payments may be made in full (R. 20). The 10% must be retained on the first half of performance in any event. Accordingly, 10% of half of the total contract price of $53,891.00 would be $2694.55 retained on completed work. If the latter figure is added to the total actual payments of $49,602.50, then $52,297.05 worth of work on the total contract for $53,891.00 must have been performed, leaving unperformed work in the amount of $1,593.95.

However, the case was apparently tried against the surety, the original contractor not appearing, on the theory that the original contractor had been paid in full for the work done. The difference between $53,891.00 and $49,602.50, or $4,288.50, was still unpaid on the original contract. Petitioner secured "completion" for $3,781.00 (R. 6, 73), to which were added engineering and travel expenses of $2,137.54 and $414.00 (R. 6, 7, 73-74), making a total of $6,332.54 from which was deducted the unexpended balance on the original contract ($4288.54) leaving excess costs charged in the sum of $2,044.04 (R. 81). But this latter figure involved costs other than the "completion" contract. The "completion" contract was for only $3,781.00 (R. 6, 73), or $507.54 less than the $4,288.54 unpaid on the original full contract price of $53,891.00 (R. 4, 77).

liquidated damages as forfeitures or required the claimant to prove that the liquidated damages bore some relation to actual damages.[14] The statute says only that "such stipulation" as the parties make shall prevail, and petitioner does not contend that the statute ties the hands of contracting officers.[15] The presently published instructions

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[14] The purpose of the statute is stated by the letter of the Secretary of the Treasury submitting it under date of February 3, 1902, printed in the committee report, and introduced in the record of the debate. His complaint was that, upon familiar principles of equity, stipulations entered by the contracting officers were rendered nugatory by "the attitude of the courts in favor of construing as penalties wherever possible all stipulations for liquidating damages." House Rep't No. 1794, 57th Cong., 1st Sess.; 35 Cong. Rec. 4835. The previous month this Court had stated that equity was "accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfillment of a principal obligation," acknowledged the rule to be that relief could be had in cases of "an excessive disproportion between the stipulated sum and the possible damages," and at least implied that parties were free to raise an "issue concerning a disproportion between the agreed and actual" damages involved. *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 660, 672-673 (decided January 13, 1902). *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119. *Taylor* v. *Sandiford*, 7 Wheat. 13; *In re Gelino's*, 43 F. 2d 832, 51 F. 2d 875, cert. denied 284 U. S. 659. That rule is now embodied in the Restatement of Contracts, § 339.

Another purpose of the statute was, as it states, to permit the contracting officer "to remit the whole or any part of such damages as in his discretion may be just and equitable". 40 U. S. C. § 269. Prior and, despite the statute, subsequent rulings of the accounting officers have been to the contrary. 11 Comp. Dec. 113 and 394; 12 *id.* 466; 13 *id.* 322 and 853; 14 *id.* 237; 18 *id.* 786; 4 Comp. Gen. 306 and 578 at 581-582; 5 *id.* 750 and 767; 7 *id.* 594 at 599; 10 *id.* 433; 14 *id.* 468; 15 *id.* 533; 16 *id.* 918; 17 *id.* 354.

[15] The petitioner views the statute as one which "precludes any possibility of treating the damages as a penalty" (Br., p. 12). The Comptroller General has ruled that the statute "is directory and the failure to so stipulate does not nullify agreements fully performed, any failure to so provide being for correction by the Secretary of the Treasury or action by the Congress." *Liquidated Damages—Public Building Contracts*, 4 Comp. Gen. 58, 59. In *United States* v. *United Engineering Co.*, 234 U. S. 236, 242, this Court said of a supplemental contract for the construction of a pumping plant entered in 1903, and therefore involving contemporaneous administrative construction: "The Government required no stipulation * * * as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered." Current government contract practice, as set forth in point (1) *infra*, tends to eliminate stipulated day-by-day damages entirely from contract provisions. As set forth in point (2) *infra*, Article 9 itself admittedly does not cover all delay situations.

Where Congress has chosen to fix rigid liquidated damages for delay, as it has in the matter of certain aspects of supply contracts, it has done so specifically and in detail by statute (41 U. S. C. § 36). The older and still operative provision for liquidated damages in connection with naval contracts, apparently the only other statutory provision on the subject, leaves the "forfeiture" as "liquidated damages" to whatever is "specified in such contract" by the contracting officers (34 U. S. C. § 563, R. S. § 3720, 5 Stat. 617).

for the form of construction contract here involved expressly recognize that liquidated damages may be wholly waived "if time is not of the essence," in which case "so much of the language in Article 9 as relates to liquidated damages shall * * * be deleted" (41 C. F. R. §12.23, *Directions for Preparation of Contract*, ¶14, p. 19 [C. F. R. v. 10, p. 1333]). Neither the courts nor the accounting officers have construed the statute as supplying liquidated damages beyond the stipulations of the parties.[16] There is therefore no reason to conclude, as does petitioner at the end of its brief, either that "the statute would * * * fill any interstices in the liquidated damage clause in the present contract" (Br. 29) or that the statute "is a reliable guide to the interpretation of the liquidated damages clause" (Br. 30 n.). For the statute states its own rule of construction—that *"such stipulation"* shall be binding. Should any court supply what it felt the administrative officers should do would be a plain encroachment upon executive prerogative.

The logic of petitioner's position, as appears from its brief, is three-fold:

(1) A per diem damage provision must be included in all contracts;

(2) It must be applicable to every conceivable form of delay in every conceivable circumstance; and

(3) Whenever the contract language is insufficient to accomplish either of these requirements, the courts must supply the omission.

But petitioner is not consistent, for petitioner concedes that many delay situations are not covered, as set forth in subpoint (2) *infra*.

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[16] In *Robinson* v. *United States*, 261 U. S. 486, 488, this Court, speaking through Mr. Justice Brandeis, stated that the statute requires only that "some" provision for liquidated damages be inserted in contracts. See 4 Comp. Gen. 58, 59.

The specifications.—Petitioner's contention that the specifications may stand alone and thus broaden the application of per diem liquidated damages is obviously untenable. The contract specifications supply the rate, but not the application, of liquidated damages. The only reason for the specification here was that, the contract being a form, some supplementary document or blank was required for the insertion of the rate of liquidated damages. The contract shows on its face that the specification was intended merely to state the rate and not the application of the stipulation for per diem liquidated damages.[17] The directions for the preparation of construction contracts specifically indicate that the specifications are to supply only the rate.[18] The Government is mistaken in stating that paragraph 5 of the specifications "is a provision which was fashioned for the particular contract here involved and not a standard form provision prescribed for general use" (Br. p. 14), nor was it in any real sense—apart from the sum stated—"drafted particularly for the instant case" (Br. pp. 14-15); for Paragraph 5 of the specifications is merely a paraphrase of the standard "Directions for Preparation of Contract" (par. 14, R. 66; 41 C. F. R. § 12.23,

[17] Article 9 of the contract here involved, in the very sentence stipulating the situation in which per diem damages should apply, provides that the "liquidated damages for each calendar day" shall be in "the amount as set forth in the specifications or accompanying papers" (R. 16). Paragraph 5, therefore, does no more than fix that amount as $25.00 per day (complaint, par. XI, R. 8; answer, par. VII, R. 31). The Government concedes that they must be read in conjunction (Br., pp. 11, 14). This Court has held that Government contracts, in cases of conflict between contract terms and the specifications, must be read as a whole; and, if there were a real conflict, the contract would be void for uncertainty. *United States* v. *Ellicott*, 223 U. S. 524, 540-543.

[18] The directions for the preparation of construction contracts upon the form here involved specifically state that: "The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract" (R. 66). The instructions themselves, therefore, indicate that the specifications are to include no more than "the amount" or rate of per diem damages. They indicate, moreover, that such liquidated damages are to apply "as indicated in Article 9 of the contract". These instructions are standard (41 C. F. R. § 12.23, Directions for Preparation of Contract, ¶ 14, p. 19 [C. F. R. v. 10, p. 1333]).

Directions for Preparation of Contract, ¶ 14, p. 19 [C. F. R. v. 10, p. 1333]).[19] If there were merit in petitioner's reliance on the specification here, then it should have prevailed in the several situations set forth in subpoint (2) *infra* where it concedes that per diem damages do not apply.

The contract.—The issue here, therefore, involves only the construction of Article 9. Such a problem loses reality except as considered upon the background of administrative practice generally and under Article 9 specifically. General governmental practice tends to eliminate liquidated damage provisions entirely, and even the stipulated per diem damages stated in Article 9 concededly do not apply in most situations in which there is delay.

(1) **Contracting officers write different forms of contract provisions for per diem damages variously applicable as deemed appropriate, or more frequently limit or eliminate them entirely.**—There is apparently no published compilation of Government contract forms prior to the Code of Federal Regulations, and there are no fixed forms all agencies are required to follow.[20] Reference to the records of

[19] A somewhat stronger case, from the Government's standpoint, was presented in *Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 252, 254, in which the rate of per diem damages was specified in Article I of the contract itself rather than in the specifications. Article IX of the contract there was the same as Article 9 here. The Court of Claims held (pp. 252, 254): "Article I of the contract provided in general terms liquidated damages for delay in the completion of the contract at the rate of $35 per day for each calendar day after the time set for completion until the work should be completed and accepted. * * * We think that Article I and Article IX must be construed together. Article IX being the specific provision should be controlling." *A fortiori*, here, where the rate is specified not in the contract but in the specifications, the terms of the contract proper must be controlling.

[20] At some period during the 1920s there was apparently an inter-departmental Board of Contract Adjustment, which is said to have collected contract forms. During the same period, the Bureau of the Budget undertook to issue, either with or without presidential approval or direction, certain forms. These were movements designed in part to secure uniform contracting practice, but it does not appear that anything more than a start was ever made and, since 1933, the several agencies have pursued independent courses and no attempt has been made by the Budget Bureau to require uniformity.

cases involving Government contracts indicates that almost every conceivable form of contract provision relating to delays and damages has been utilized and, where contracting officers have wished per diem damages to reach the situation here presented, they have chosen appropriate language therefor.[21]

The Federal Works Agency[22] form of liquidated damage provision for construction contracts is that of the instant contract (41 C. F. R. § 12.23). But the official instructions also permit changes in the form of "interlineations, dele-

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[21] See the provisions quoted or referred to in notes 8, 9, 10, and 15, and the references to regulations set forth in the text *infra*. The decision of the Comptroller General in 1924, reported in 3 Comp. Gen. 636, 637, sets forth a form of construction contract wherein it is expressly provided, unlike the present case, that in case of termination of the contract "any excess of cost resulting from such failure, including any charges on account of delay, shall be charged to the contractor"; and the charges were therein defined as $150 for every working day. Another form found in the reported decisions states that, "No delay shall be charged against the contractor where the head of the department or independent establishment certifies that such delay has caused no damage to the United States." 5 Comp. Gen. 363; 7 Comp. Gen. 595, 598. Still another form, which expressly eliminates the question here raised by petitioner, provides that liquidated damages shall apply "for each calendar day's delay until the work is satisfactorily completed or until such time as the United States may reasonably procure the completion of the work by another contractor or complete the work itself." 7 Comp. Gen. 595, 597; 8 Comp. Gen. 530 (1929). In *Wise* v. *United States*, 249 U. S. 361, 364, the contract provided liquidated damages "for each and every day during the continuance of such delay and until such work shall be completed." In *Graham* v. *United States*, 231 U. S. 474, 476, the situation here presented was before this Court but the contract contained no stipulation for damages other than excess costs. Only excess costs were provided for in the rivers-and-harbors contract involved in *Midland Land & Improvement Co.* v. *United States*, 58 C. Cls. 671, 672, aff'd 270 U. S. 251. In *Maryland Steel Co.* v. *United States*, 235 U. S. 451, 458, this Court held that a contracting officer might waive time for performance and, with it, liquidated damages if he deemed "performance within the stipulated time • • • unimportant." In *Maxwell* v. *United States*, 3 F. 2d 906, there was involved a Treasury Department contract providing for per diem damages "for each and every day the party of the second part shall be in default" (R. 135) and also that the Government might terminate the contract for delay "in which event" the contractor should "be liable for any damage incurred through such default" (R. 161). These provisions are not as limited to those of Article 9. The contractor continued working after the date for completion, but thereafter the Department terminated the contract. However, the Government claimed only excess costs. R. 18, 3 F. 2d at 908, aff'd per curiam 271 U. S. 647.

[22] The Act of June 6, 1902, 40 U. S. C. § 269, applied only to the Treasury Department. Reorganization Plan No. 1, pursuant to the Reorganization Act of 1939, transferred the functions of the Public Buildings Branch of the Procurement Division of the Treasury to the Federal Works Agency. 5 U. S. C. § 133 t, n.

tions, additions, or other alterations" (41 C. F. R. § 12.23, *Directions for Preparation of Contract*, ¶ 2 p. 18 and ¶ 14 p. 19 [C. F. R. v. 10, pp. 1332 and 1333]). The published instruction forms also clearly indicate that the liquidated damage provision may be deleted entirely (*id.*, ¶ 14). The current form of supply contract of the same agency provides for the recovery only of excess costs and not for additional stipulated per diem damages in cases of delay (Article 5, 41 C. F. R. § 12.32). The *Directions for Preparation of Contract* provide a substitute provision for liquidated damages for each calendar day of delay for use "if it is deemed necessary" (41 C. F. R. § 12.32, ¶ 5, p. 36 [C. F. R. v. 10, p. 1350]). In such contracts the forms provide for both termination and the recovery of excess costs (*id.*, Articles 4 and 5). Unlike the construction contract form, the supply contract form provides not only for termination but for the application of liquidated per diem damages, where deemed necessary, "accruing until such time as the Government may reasonably procure similar material or supplies elsewhere" (41 C. F. R. § 12.32, *Directions for Preparation of Contract*, ¶ 5, p. 36 [C. F. R. v. 10, p. 1350]), which thus expressly provides what the Government urges this Court to supply by implication in this case.

The War Department [23] regulations regarding contracts anticipate that special conditions may be added (10 C. F. R. § 81.16(a)). Liquidated damage clauses, in addition to stipulations for recovery of excess costs, are to be included only in cases in which "it is determined * * * that the Government would be damaged in case of delay in performance" and "such a clause will not be included in an invitation for bids except in such cases" (10 C. F. R.

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[23] The Navy Department regulations do not set forth forms of contract. The instruction on cancellation does not mention liquidated damages or even excess costs (34 C. F. R. §8.1056), and the only instructions issued are those respecting excess costs (34 C. F. R. §8.1080(h)).

§ 81.16(c)). Both of these provisions were omitted in the revision of 1942 (7 F. R. 6098). The current and rapidly changing War Department regulations [24] relate to the procurement of anything other than real estate and include the procurement of construction work and rivers and harbors projects (10 C. F. R. § 81.108.1). The standard form of "Delays-Damages" provision prescribed does not include liquidated damages (10 C. F. R. § 81.352) and it is expressly required that "except with • • • permission • • • or in accordance with general instructions • • • no contract shall provide for liquidated damages in the event of default" (10 C. F. R. § 81.352-A).[25] The War Department form of lump-sum construction contract, otherwise patterned in part upon Article 9 of the contract form here involved, entirely omits provision for liquidated damages for delay (10 C. F. R. § 81.1302.9 [Form No. 2]), and the fixed-fee construction contract form contains no provision for liquidated damages (10 C. F. R. § 81.1303 [Form No. 3]). The form of Government-owned equipment rental agreement contains a stipulation only for certain costs (10 C. F. R. § 81.1314.10 [Form No. 14]). The form for architect-engineer services includes only a stipulation for payment of excess costs in case of termination (10 C. F. R. §81.1316.14 [Form No. 16]). The purchase order forms provide only for actual damages in case of delay (10 C. F. R. § 81.1317-A-A, ¶ 11 [Form No. 383]; 10 C. F. R. § 81.1317-B-2, ¶ 11 [Form No. 18]; and § 81.1317-C-2, ¶10 [Form No. 47]). The Ordnance Procurement Instructions relating to contracts provide a form of contract provision for "Delays

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[24] A convenient collection is the Commerce Clearing House *War Law Service, Government Contracts.*

[25] Liquidated damages, where inserted in contracts, may be released upon certain approvals (10 C. F. R. §81.308-E(1)). Forms include a provision that delays and damage articles of contracts shall be suspended in case of the general termination of war contracts (10 C. F. R. §81.324.1(b) [section (1) of form]). See Ordnance Procurement Instructions §3.236.1(c), §3.236.8, and §3.236.9.

—Damages" which includes excess costs but not liquidated damages (§ 3,123.1).

Petitioner, therefore, is in error in stating that Article 9 "appears in all Government construction contracts unless a deviation is authorized" (Br. 29 n. 20). Nor is there, as petitioner states, any showing of "consistent administrative application" (Br. 19). The Comptroller General does not prepare, approve, or otherwise supervise contract forms.[26] He is merely an independent accounting officer who undertakes to apply contract provisions in connection with audits or settlements of claims, often in opposition to the expressed desires of the responsible administrative officers.[27] So far as the comptrollers have passed upon the question, moreover, they have not been consistent.[28]

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[26] The Budget and Accounting Act, 1921, 42 Stat. 20, transferred to an independent Comptroller General the functions of the prior Comptroller of the Treasury "relating to keeping the personal ledger accounts of disbursing and collecting officers". Those functions were to be thereafter exercised, as the main purpose of the legislation, "without direction from any other officer." "The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." 31 U. S. C. §44. The Comptroller General was to provide for the payment of claims "adjusted and settled in the General Accounting office" (31 U. S. C. §47). He was authorized to prescribe forms only for accounting and disbursing purposes (31 U. S. C. §§49-50).

[27] See Mansfield, *The Comptroller General* (Yale Press, 1939), pp. 2-3 and *passim*.

[28] The Comptroller of the Treasury, who preceded the Comptroller General, ruled in 1908 that, in case of failure of performance, "any provision for liquidated damages * * * can not be effective * * * to charge * * * additional damages beyond the difference in cost." 14 Comp. Dec. 733, 740-741. See also 18 Comp. Dec. 599, 602; 19 *id.* 278. In 1920 precisely the situation here presented was the subject of decision, and the Comptroller held that the annulment of the contract for delay eliminated day-rate liquidated damages otherwise accrued and applicable. 26 Comp. Dec. 736, 737-738.

Shortly after the creation of the General Accounting Office the Comptroller General, considering a contract of substantially the same substance as that here involved, ruled that "the contract clearly provides for liquidated damages in case the contractor is permitted to continue the work to completion as contemplated under the original contract. It further provides that the Government may, for certain causes, take the work out of the contractor's hands or affirmatively grant additional time for performance, in either of which events the liquidated damage provision would not apply." 2 Comp. Gen. 204, 207. In 1927, however, Comptroller General McCarl directed that "administrative or disbursing officers should not undertake to determine whether liquidated damages did or did not accrue * * * But in all cases * * * deduction of liquidated damages covering the entire period of delay, regardless of cause,

(2) **Admittedly, per diem damages for delay are not provided or claimed in several situations under the contract form here involved.**—Petitioner's basic position in this case is that per diem damage provisions must not only be included in all contracts but that they must cover every delay, including particularly that in the circumstances here involved. However, petitioner also admits that other delay situations need not be subject to per diem damages.

Under Article 9 of the form here involved there are at least six delay situations. In one all parties agree that per diem damages apply. In four, the Government does not claim that per diem damages apply. Only in the sixth situation, here presented, does the petitioner contest the established interpretation of the contract provision. The court below thus properly observed that (R. 96)—

> Under this contract not all inexcusable delays are made compensable by payment of the stipulated sum.

If delay must or should be covered by per diem liquidated damage clauses in construction contracts, wholesale revision of contract forms, including Article 9 of the instant form, would be required.

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should be proposed." 6 Comp. Gen. 650, 651. He also forbade administrative officers to grant extensions of time for the completion of contracts. 7 Comp. Gen. 505, 506; *id.*, 534, 536-537; 8 *id.*, 13, 14-15; *id.* 623, 624-625. But in 1928 he was still of the view that Article 9 "provides for the cancellation of a contract in event of default of a contractor or *for permitting the contractor to continue until performance has been completed*, with a charge for liquidated damages * * * The administrative authority is limited to either cancelling the contract for default * * * *or permitting the contractor to continue until performance has been completed* and reporting the facts of the delay to this office for consideration as to whether liquidated damages should or should not be charged under the contract." 8 Comp Gen. 13, 14-15, emphasis supplied.

His decisions dealing with the applicability of liquidated damages in cases of delay are reported at 7 Comp. Gen. 409; 8 *id.*, 266, 268, 270 and 318, 320; 12 *id.*, 507; 15 *id.*, 409 and 913. As set forth in Point II(2) *infra*, it is now conceded that the day-rate liquidated damages stated in Article 9 do not apply in four of the six possible delay situations. All have been adjudicated by the Court of Claims, from the decisions of which no appeal to this Court was ever attempted.

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The six situations arising under the presently involved form are as follows:

(a) *Termination prior to time for completion.*—"If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified," contracting officers may terminate the contract prior to time for completion; and, in such cases, the Government may recover any "excess cost" incurred in completion (R. 15-16) but does not claim and is not permitted per diem damages for such delay. *Firemen's Fund Indemnity Company* v. *United States*, 93 C. Cls. 138[29] Nonapplicability of per diem damages in this situation was conceded by the petitioner in the court below (Br. for Appellee, p. 15); and the petitioner now excludes this situation by confining the question to "wherever the Government permits the contractor to proceed beyond the stipulated completion date" (Br., p. 10). Petitioner expressly argues that "a contractor, of course, will not have to pay liquidated damages where the Government terminates his right to proceed prior to the stipulated completion date" (Br. 21) and seeks to explain this omission on the ground that any such situation "involves controversial issues of fact" (Br. 21, n.); but difficulties of proof are precisely what liquidated damages are for.

(b) *Termination for non-completion on day fixed for completion.*—If the Government terminates the contract on the day fixed for completion, it does not claim and is not

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[29] This decision was in accord with that of this Court, speaking through Mr. Justice Holmes, in *United States* v. *O'Brien*, 220 U. S. 321, 163 F. 1023, 159 F. 671, wherein it was held that recovery of excess costs could not be had on termination prior to the stipulated completion date. See also *Stone & Gravel Co.* v. *United States*, 234 U. S. 270. In those cases the contract forms differed greatly from that here involved, permitting forfeitures but not recovery of actual damages or excess costs on termination for delay.

permitted per diem damages for the delay. *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. Petitioner accepted this distinction in the court below (Br. for Appellee, p. 26); and the Circuit Court of Appeals said (R. 96)—

> Where the contractor breaches his agreement to finish the work within a specified time and the Government declines to allow him to proceed beyond the completion date, vexatious delays resulting in the temporary loss of use of a needed structure inevitably ensue; but in such contingency the Government has limited itself to the recovery of excess costs plus such other damages * * * as are recoverable under general legal principles.

The contracting officers of the Federal Works Agency, however, have chosen not to draw a form which would apply day-rate liquidated damages in this situation.

(c) *Inability or refusal to proceed prior to or beyond date fixed for completion.*—If the contractor is unable or refuses to proceed prior to or beyond the completion date fixed, per diem damages have been held not collectible for the delay for the period from the specified completion date to the actual completion through another contractor or the surety. *Commercial Casualty Co.* v. *United States*, 83 C. Cls. 367; *American Employer's Ins. Co.* v. *United States*, 91 C. Cls. 231, 236, 238. Petitioner adopted this distinction in the court below (Br. for Appellee, p. 26).

(d) *Delayed completion by contractor.*—If, despite delay prior to the completion date or non-completion on the date fixed, the Federal Works Agency permits the contractor to proceed to completion with the contract, it may admittedly recover liquidated damages "for each calendar day of delay until the work is completed" (R. 16) by the contractor. All parties admit liability for per diem dam-

ages in this situation, for which the contract provision was obviously drawn.[30]

(e) *Period from termination for non-completion to actual date of completion.*—If the contractor is allowed to proceed after the date fixed for completion and the Federal Works Agency later terminates the contract for non-completion, no per diem damages are demanded for the period from the time of termination to the time of actual completion by someone else. In *Fidelity & Casualty Co.* v. *United States, supra,* per diem damages for the period following both the termination date and the completion date were disallowed; and the same result was reached in *Commercial Casualty Co.* v. *United States, supra,* and *Firemen's Fund Indemnity Company* v. *United States, supra.* In *American Employer's Ins. Co.* v. *United States, supra,* per diem damages from the date of termination to the date of actual completion were claimed but, before decision, the Government abandoned the claim (pp. 236, 238). In subsequent cases, including the present case, per diem damages have not been claimed for such periods.

(f) *Termination for non-completion after date fixed for completion.*—If the contractor is permitted to proceed after the date fixed for completion and the Federal Works Agency thereafter terminates the contract for non-completion, as in the instant case, petitioner now seeks to recover liquidated per diem rather than actual damages, in addition to excess costs, for the period from the stipulated completion date to the later date of termination of the contract. Where the question has been raised the courts, with the exception of the trial court below, have denied per diem damages in this situation. *Maryland Casualty Company* v. *United*

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[30] The contract provision is expressly applicable in this situation to "any separable part" of the work, and the liability has been so applied. *American Employer's Ins. Co.* v. *United States,* 91 C. Cls. 231.

States, 93 C. Cls. 247 (1941);[31] *United States* v. *Cunningham*, 125 F. 2d 28;[32] and *United States* v. *Maryland Casualty Co.*, 25 F. Supp. 778 (Me.).[33] In *United States* v. *Continental Casualty Co.*, 29 F. Supp. 298 (La.), the issue was not presented, presumably because of the trifling amount of liquidated damages involved.[34] In the instant

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[31] That case involved the same provision as the instant case. Three months after the date for completion the Government terminated the contract, the surety elected not to complete the work so that the United States was required to do so, and the Government deducted per diem damages for the period subsequent to the stipulated date for completion but prior to the date of termination of the contract. The Court of Claims, in allowing the surety to recover the sum so withheld, said (p. 254): "Article IX gives the Government the choice of permitting the contractor to continue and collecting $35 per day as liquidated damages for delay, or of pursuing the other course by taking over and finishing the work, and collecting the excess costs incurred in the completion of the contract. By its terms it does not give the Government the right to collect both. The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages." Two judges dissented (pp. 256-258). They were of opinion that the per diem damages should be allowed, and stated that the prior decisions of the Court of Claims did not involve situations in which the contractor was allowed to continue working beyond the completion date of the contract. Judge Whitaker was of opinion that "until the contract was terminated, this provision [for per diem damages] was operative." Judge Madden, who "would decide the case as Judge Whitaker has suggested in his dissenting opinion," felt that there was merit in the distinction and that, "if * * * the work is not allowed to remain in the hands of the contractor beyond the time agreed for completion, there is reason for not permitting the Government to claim liquidated damages for delay in completion." The inconsistency in the rule suggested by these dissenting judges is discussed in note 39 *infra*.

[32] There the Court of Appeals for the District of Columbia permitted recovery by the contractor of per diem damages withheld by the Government for the period between the stipulated completion date and the termination of the contract by the Government nearly two months later. Justices Groner, Miller, and Rutledge were unanimous on the issue here presented.

[33] This case arose under a somewhat different form of Government contract than that here involved. Article 4 of the contract provided for termination for delay and recovery of "excess" cost and other expenses occasioned the United States thereby. Article 5 provided for liquidated damages "for each and every day the contractor shall delay in the completion of this contract." The court held that the Government could not secure per diem damages for delayed performance under Article 5 where it had taken over under Article 4 which did not specify per diem damages but only excess cost and other expenses.

[34] The applicability of the contract provisions for liquidated damages was mentioned but not discussed, the surety defending on other grounds against "all and every liability to the United States" (p. 602). On appeal, 113 F. 2d 284, 285, it appeared that there was involved only "the sum of $620 as liquidated damages * * * for the delay * * * beyond the contract date down to the date of * * * bankruptcy" of the contractor, as compared with the contested sum of $26,154.70 excess cost claimed by the Government under Article 9. The liability for per diem damages was not argued

case the Circuit Court of Appeals for the Ninth Circuit disallowed recovery of per diem damages (136 F. 2d 437), reversing in that respect the two opinions of the trial court (29 F. Supp. 819 and 44 F. Supp. 871).

State and local government cases, and wholly private contract cases, involve contracts with different terms respecting delay or liquidated damages. None of them appears to involve the question presented here.[35]

(3) **The contract expressly states an alternative, conditions per diem damages upon non-termination, presents no ambiguity for construction, and renders petitioner's position doubly inconsistent.**—Article 9 presents a plain alternative:

> [1] "The Government may take over the work * * * and the contractor and his sureties shall be

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or discussed on the appeal, although the Circuit Court of Appeals expressly allowed $620 in per diem damages (p. 286). This Court denied certiorari. 311 U. S. 697, 729. The Court of Appeals for the District of Columbia, referring to this decision in a subsequent case, observed that the issue involved "does not seem to have been raised by the parties. The issue in the case was whether there was a contract between the United States and the contractor's surety, which had taken over the performance of the work. The surety claimed there was and that it had suffered damages by the refusal of the United States to make progress payments pursuant thereto. The case is, therefore, not helpful on the point in discussion here." *United States* v. *Cunningham*, cited in the text *supra*, p. 32. The Government here admits that "the precise questions here involved were not presented to the court" (Br. 25 n. 13).

[35] *City of Reading* v. *United States Fidelity & Guaranty Co.*, 19 F. Supp. 350 (Pa.), and *Southern Pac. Co.* v. *Globe Indemnity Co.*, 2 Cir., 21 F. 2d 288, were abandonment cases in which the terms of the contracts do not appear. *Six Companies* v. *Joint Highway Dist. No. 13*, 24 F. Supp. 346 (Calif.), involved a situation in which the plaintiff contractors suing to recover sums withheld as liquidated damages had attempted to rescind their contract on various grounds. The case is not in conflict with the federal rule because the contract expressly provided for liquidated damages "for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work," although the whole of the contract provision does not appear; and the Circuit Court of Appeals for the Ninth Circuit affirmed the decision (110 F. 2d 620), whereas under the different terms in the instant case it denied per diem damages (136 F. 2d 437). It was reversed by this Court in the *Six Companies* case, however, on the ground that the law of California, as declared by an intermediate state court of appeals to the effect that "the stipulation in the contract as to the amount of damages in case of delay in completion was not applicable to delay after the contractor had abandoned the work," was controlling. 311 U. S. 180.

liable to the Government for any excess cost * * *"; or

[2] "If the Government does not terminate the right of the contractor to proceed, * * * the contractor shall pay to the Government * * * liquidated damages for each calendar day of delay until the work is completed or accepted * * *".

Contracting officers may exercise the first alternative at any time—before, on, or after the termination date. The second alternative fixes a double condition precedent to liability for day-rate liquidated damages——

[1] "If the contractor * * * fails to complete said work within such time" and

[2] "If the Government does not terminate the right of the contractor to proceed."

The first of these conditions eliminates per diem damages in cases of termination prior to the date for completion. The second predicates such damages upon non-termination after the completion date.

The then responsible officers adopted these provisions for obvious reasons: Contractors will not, without compensation, assume the stipulated damages for both (a) excess costs whenever the contracting officers may choose to take over and (b) day-rate penalties. 15 Comp. Gen. 627. Those officers did not deem it wise or economical to require both. Secondly, the Agency is amply protected by its right to terminate before, on, or after the date fixed for completion. In return for the right to take over at any time, the Agency has found it wise to omit per diem damages in case it does take over. [36]

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[36] The several courts which have decided the question here presented, always contrary to the contention of petitioner except the trial court below, have emphasized different bases for decision. The view of the contract as an alternative was the ground of decision of the Court of Appeals for the Dis-

It is not for courts or accounting or law officers to remake so explicit a contract. There is room for construction only where a contract is ambiguous, but there is no ambiguity here because the contract expressly authorizes per diem damages only "if the Government does not terminate the right of the contractor to proceed" (R. 16).[37]

The "interpretation" contended for by petitioner admittedly "requires some implications from the express language" of the contract (Br. 29). It requires at least two plain departures. *First*, it must disregard the express condition to the effect that per diem damages shall apply only "if the Government does not terminate the right of the contractor to proceed" (R. 16). Petitioner *arguendo* attempts to substitute other language for the word "if";[38] but it wholly ignores the supporting phrases "in such event," "in which event," and "in lieu thereof"—all of which emphasize the absolute nature of the condition precedent to liability for per diem damages. *Secondly*,

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trict of Columbia in *United States* v. *Cunningham*, 125 F.2d 28, 31. The court below, on the other hand, rested decision on the plainly stated condition precedent to the second alternative expressed in the contract (R. 96-97). The alternative form of contract has been used on occasion for at least 35 years. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 161.

[37] The Government first assumes that the contract provision "is ambiguous" (Br. 17), asks judicial relief for what it asserts to be "unintentional ambiguities in language" (Br. 20), and insists that "a provision so cloudy in meaning" must be construed to favor the public interest (Br. 23). To this conclusion, in addition to the unwarranted assumption that there is any ambiguity, there are two answers: There is no rule requiring that contracts be fashioned to the views of law or accounting officers. §236(f) of the Restatement of Contracts, to which petitioner cites as its sole authority (B. 23), is applicable only where "the ordinary meaning of the language" does not determine the question; for §236 is expressly applicable to situations in which meaning "remains uncertain after the application of the standards of interpretation stated in * * * §235." Indeed, if any rule of interpretation is warranted here, it is that of the same §236, applicable because the Government drew the contract, to the effect that, "Where words * * * bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed * * *." (Subsection (d).) See to the same effect Williston, *Contracts*, Rev. Ed., § 621. Moreover, § 339 of the Restatement assimilates liquidated damages to actual damages.

[38] This it does by putting unuttered words in the mouth of the court below, and then arguing them down. It states that the court below read the provision "as though" it provides "if the Government *never* terminates" (Br. 16), whereas the court below read and stated the provision as written by the parties. Then

should appropriate language be substituted for the word "if" as petitioner asks, the revised language would still be inconsistent since the remainder of the same sentence as presently written provides that liquidated damages shall be paid "for each calendar day of delay *until the work is completed or accepted*" (R. 16). Thus, under petitioner's contention, "there is a date from which, but no date to which the per diem damages can be calculated." *United States* v. *Maryland Casualty Co.*, 25 F. Supp. 778, 780. Petitioner recognizes this inconsistency and seeks to explain it away on the ground that the phrase "until the work is completed or accepted" means "merely the ultimate date of the contractor's liability" and is "not definitive" (R. 18, 17-19). This argument patently ignores the meaning of the provision, for it has no other purpose than to define precisely both the event and the extent of liability for liquidated damages.[39]

Petitioner asks that some language be extended and some be ignored. Of course in its attempted substitution of the indecisive phrase "so long as" and its ignoring of the phrase "until the work is completed or accepted" petitioner is attempting to hold necessary changes in language down to a minimum. But what it really requires to make its interpretation prevail is the entire rewriting of the provision.

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it states that the fictitious interpolation of the word "never" is "no more compelling" than the Government's substitution of the phrase "*so long as*" in place of the word "if" (Br. 16, 30). Apart from the plain admission thereby that petitioner seeks to redraft the provision in its own favor, even the phrase "so long as" does not avoid the impediment in petitioner's way, because "so long as" may mean nothing different than "if".

[39] One of the two dissenting judges in *Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 256-258, upon whose reasoning petitioner's brief relies (Br. 22, 23, 25, 28), ignored this inconsistency and the other, Judge Madden, sought to justify the elimination of the period after termination from the computation of liquidated damages on the ground of the difficulties of the "inquiry" which would have to be made in such a case. But the very purpose of liquidated damages is to avoid the necessity for any inquiry and to impose a rule of decision requiring only simple arithmetic. There is no reason to cite the difficulties of proof as a reason for not applying a rule of liquidated damages, for those difficulties are precisely the reason why parties do sometimes stipulate for liquidated damages.

(4) The assumed facts and equities upon which the petitioner bases its case are untenable.—Interspersed in its arguments respecting the interpretation of the contract terms are a number of assumptions of fact and assertions of equity. These are untenable not only in themselves but upon the background of the powers and remedies of the Federal Works Agency under the contract.

The Federal Works Agency, in writing its own contract (R. 9-22), reserved to itself conclusive decision as to discrepancies in the terms and specifications (Art. 2), controversies over changes and increased expense incident thereto (Art. 3), the finding of and changes respecting changed conditions (Art. 4), charges for extra work or material (Art. 5), determination of rejections and replacements as well as the costs thereof (Art. 6), the determination of the quality of materials (Art. 7), the dismissal of employees (Art. 7), the character of superintendence (Art. 8), the termination of the contract at any time for delay (Art. 9), the letting of other conflicting contracts at the site (Art. 13), determination of all disputes of fact (Art. 15), and the amount of progress payments (Art. 16) in which connection the Agency could always retain ten percent and, before final settlement, could demand a release of all claims against the Government (Art. 16). At any time the Agency may call for additional security (Art. 17).

The petitioner's asserted equities are to be judged not merely from the standpoint of the rights of the contractor but with regard for the extensive and intensive control exercised by the Federal Works Agency during all stages of the performance of the contract. Petitioner makes two arguments:

(1) Petitioner asserts that the presently settled construction, disallowing per diem damages in a case in which the Agency at any time terminates the contract, places it

in the power of the contractor to procrastinate and so "provoke" the Agency to terminate the contract.[40] This argument ignores realities and the terms of the contract.

The Agency has expressly reserved the right to terminate the contract for delay before, upon, or after the date fixed for completion; and it has a responsibility as well as a right in such cases. As stated by Mr. Justice Holmes in a somewhat similar case, "the right to terminate • • • is the protection expressly stipulated by the United States." *United States* v. *O'Brien*, 220 U. S. 321, 327.

Delay which does not result in immediate termination of the contract is costly to the contractor—independently of either per diem damages, stipulated excess costs, or actual damages he may have to pay—because he must continue the work longer for no greater compensation. Progress payments to him and ten percent of the entire compensation are withheld (Art. 16, R. 19-21). "Provision for monthly payments • • • and therefore of course giving little pay for little work, is the protection expressly stipulated by the United States." *United States* v. *O'Brien, supra.* He is charged with the expense of rejections and replacements (Art. 6, R. 12-14). He is in trouble with the contracting officers, who are the conclusive judges of all issues of fact (Art. 15, R. 19; and see Arts. 2 through 9, R. 10-17). He

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[40] Petitioner states that delays, asserted to be of frequent occurrence (Br. 20-21), may be long (Br. 16, 19), that the presently established construction leaves it to the contractor to prevent the collection of per diem damages by prolonging delay and thus "provoking the Government into a termination of his right to proceed", or by "abandoning the work" (Br. 21), that the contractor is thus permitted to "elect the damages he shall pay" (Br. 22), that the Agency is thus forced to abide the delay unless it "forfeit" its right to per diem damages (Br. 23, 27-28), that the contractor is thus given a "preference" despite his default (Br. 24), and that such law leaves the Agency "no other safe remedy at the stipulated completion date" than the termination of the contract (Br. 30).

Petitioner's suggestion that the contractor may abandon the contract is wholly gratuitous here. No abandonment was charged in this case. The contract provision does not recognize abandonment as cutting off the liability, for it expressly provides that, in the case of delays beyond the fixed completion date in which the Agency does not terminate the contract "the contractor shall continue the work" (R. 16).

faces the possibility that the Agency may in its discretion terminate the contract and subject him to the excess costs for completion the scope of which is reserved to the conclusive determination of the contracting officers (Arts. 9 and 15). The longer he delays, the deeper he becomes involved.

As the court below held, bad faith may not be assumed in the contracting officers for their non-acceptance of the work (R. 97). Nor, as the Court of Claims speaking through Judge Jones has held in the situation here presented, may bad faith be assumed as to the contractor's efforts to satisfy:

> It might be said just as logically that the Government might by delay * * * collect the entire amount of the contract in liquidated damages. Both of these propositions assume bad faith. No bad faith is alleged here. (*Maryland Casualty Company* v. *United States*, 93 C. Cls. 247, 255.)

The Agency is no more without a remedy in this situation than in other situations where, admittedly, per diem damages do not apply despite the provisions of Article 9. Nor is the Agency in any position inferior to that of the Government under current and more important War Department contracts wherein liquidated damage provisions are the exception.

(2) Secondly, petitioner argues that it is "fair" to assess per diem damages for delay *pro tanto* and irrespective of the termination of the contract in cases in which the contractor is permitted to proceed beyond the date fixed for completion since, it is said, it is within the contractor's power "by appropriate diligence" to avoid or lessen the damages payable (Br. 23-24) and otherwise the application of the contract leaves "uncompensated injuries" (Br. 25).

But the contractor has every reason to exercise "appropriate diligence" irrespective of per diem damages. The delay is no more uncompensated than in the several other situations where admittedly per diem damages do not apply under Article 9 or are not required at all under other forms. By its argument as to "fairness" the petitioner asks lawyers and courts to rewrite technical construction contracts which Congress has committed to an administrative agency and which that agency has negotiated. Moreover, if "fairness" is to be the test of construction of the contract, then mutuality is in order and liquidated damages should be applied for the benefit of the contractor where he, as is frequently the case, is delayed by the Government but is allowed no such recovery. *Cf.* 4 Comp. Gen. 404; 6 *id.* 255; *United States* v. *Rice*, 317 U. S. 61; *Wood* v. *United States*, 258 U. S. 120; *Wells Brothers Co.* v. *United States*, 254 U. S. 83; R. 20-21.

(5) **The equities lie with respondent.**—In two respects at least the equities, upon the record here, lie with the respondent. As set forth in Point I *supra*, petitioner in reliance upon its reservation of the right to judge the facts of compliance has refused to prove as a requisite part of its cause of action that the "completion" it insisted upon was for work required under the contract with respondent's principal.

Secondly, petitioner not only permitted long delays to continue but seeks, in addition to the excess costs and expenses it has recovered, a penalty amounting to 20% of the total contract price [41] and to nearly five times the amount

[41] Grogan was charged with 473 days delay when the time for completion was extended to June 20, 1933 (R. 5, 38). He did not meet the latter completion date—that is, to the satisfaction of the contracting officers—and more than another year was allowed to elapse before the contract was terminated by the contracting officers on July 20, 1934 (R. 5, 30-31). Thus, nearly two and a half years delay was allowed to occur, and a claim for nearly ten thousand dollars per diem damages was allowed to accumulate (R. 8, 81)

of excess costs and expenses charged to the original contractor for delay (R. 81). The party claiming damages must not permit them to accrue where they may be avoided,[42] as administrative officers have long recognized.[43] If allowed to so accrue, particularly where they involve slight breach or are not commensurate with actual damage, they are treated as void penalties.[44]

CONCLUSION.

If there were merit in petitioner's argument, a flick of the pen of contracting officers could correct it. There is, therefore, no cause to resort to construction or implication. As stated by Mr. Justice Holmes in a somewhat similar case,

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upon a contract for a total of only fifty thousand dollars (R. 4, 10, 74). The "completion" contract was dated a month after the termination of the Grogan contract and required completion in 60 days (R. 50). The record, therefore, shows that three months at the most were all that was required to advertise, let a contract, and achieve the construction the Federal Works Agency, as the sole judge of the facts, desired.

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[42] *Wicker* v. *Hoppock*, 6 Wall. 94, 99. "It was the duty of the plaintiff * * * to have subjected him to as little loss as practicable." *Telfner* v. *Russ*, 145 U. S. 522, 534, subsequent proceedings 162 U. S. 170, 166 U. S. 720. "The law required him to take that course by which he could secure himself with the least damage to the defendant." *Warren* v. *Stoddart*, 105 U. S. 224, 230. Other decisions to the same effect are legion.

[43] The War Department regulations, particularly important because of the great volume of river-and-harbor construction involved, significantly admonish its contracting officers at length to apply this rule in instances in which liquidated damages may accrue (10 C. F. R. § 81.19(e)). The latter was rescinded in 1942, 7 F. R. 6098. The current Ordnance Procurement Instructions (§ 3,502.1) state that: "It is not the policy of the Government to burden a contractor needlessly with large amounts of liquidated damages. Therefore, upon default under a contract containing any provision for liquidated damages, unless the default is likely to result in the judgment of the contracting officer in the imposition of comparatively small amounts of damages upon the contractor, the course of action * * * of permitting the contractor to continue performance under the contract and collecting liquidated damages from the contractor should not be pursued." For decisions of accounting officers to the same effect, see 11 Comp. Gen. 384; 20 Comp. Dec. 171, 179; *id.* 385, 390.

[44] 17 Comp. Gen. 827; 16 *id.* 344; 23 Comp. Dec. 71; 22 *id.* 256; 21 *id.* 36 and 377; 20 *id.* 16; 19 *id.* 20; 16 *id.* 490 and 772; 15 *id.* 388 and 701; 14 *id.* 203, 424, and 617; 13 *id.* 3; 11 *id.* 513. See also *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226.

"if the United States wants more it must say so in plainer words." *United States* v. *O'Brien*, 220 U. S. 321, 327.

Respectfully submitted,

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March 20, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 381.—October Term, 1943.

The United States of America, Petitioner, *vs.* American Surety Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 24, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

On June 24, 1931, one John V. Grogan entered into a contract[1] with the United States to construct certain public buildings at the United States Inspection Station at Babb-Piegan, Montana. Respondent became the surety on Grogan's performance bond to the United States. The completion date of the contract was March 4, 1932, but this was extended to June 20, 1933. Grogan failed to complete the work by the extended date. The Government, however, allowed him to continue with the construction. On July 20, 1934, thirteen months later, the work was still uncompleted. Pursuant to its authority under Article 9 of the construction contract, the Government thereupon terminated Grogan's right to proceed with the work because of his continuing default. The Government finished the work through another contractor, expending $2,044.04 more than it would have been required to expend had Grogan completed the work.

The United States brought this suit in the District Court to recover the excess cost and also to recover liquidated damages of $9,875 for the delay occasioned by Grogan's default. The liquidated damages were computed on the basis of an agreed $25 per day for the 395 days between June 20, 1933, the extended date for completion, and July 20, 1934, when the contract right to proceed was terminated. Grogan was not served and never appeared. The District Court denied respondent's motion to strike from the complaint the paragraph alleging a right to liquidated

[1] The form of contract used was U. S. Standard Form No. 23 construction contract, approved by the President on November 19, 1926, and used between 1926 and 1935.

damages. *United States* v. *Grogan*, 39 F. Supp. 819. The court subsequently rendered judgment, after trial without a jury, for the United States for $2,044.04 as excess cost of completion and $9,875 as liquidated damages for delay. See *United States* v. *Grogan*, 44 F. Supp. 871. On appeal, the court below affirmed the judgment as to the excess cost but reversed as to the liquidated damages. *American Surety Co.* v. *United States*, 136 F. 2d 437. The public importance of the issue of the Government's right to liquidated damages under these circumstances led us to grant certiorari. 320 U. S. 729.

Section 21 of the Act of June 6, 1902,[2] provides that all contracts for the construction of any public building under the control of the Treasury Department shall contain a stipulation calling for liquidated damages for delay in completion of the work and that such stipulation shall be conclusive and binding upon all parties. Proof of actual damages is rendered unnecessary. This statute, however, does not purport to require liquidated damages to be paid in amounts or under circumstances beyond those stipulated by the parties. *Robinson* v. *United States*, 261 U. S. 486, 488. It was pursuant to this statutory command that Article 9 of the construction contract in issue was inserted. Thus this article is determinative of the Government's right to liquidated damages under the circumstances of this case.

Article 9, set out in the margin,[3] provides in effect that: (1)

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[2] C. 1036, 32 Stat. 310, 326; 40 U. S. C. § 269. This provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." See H. Rep. No. 1794, p. 8 (57th Cong., 1st Sess.); 35 Cong. Rec. 4935.

[3] "*Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take pos-

if the contractor refuses or fails to prosecute the work with proper diligence or to complete his work within the specified time, the Government may at any time terminate his right to proceed and prosecute the same to completion by contract or otherwise, in which case the Government may recover from the contractor or his surety any excess cost occasioned thereby; (2) "if the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount set forth in the specifications." In this instance, paragraph 5 of the accompanying specifications provides that "the contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." This paragraph merely provides the agreed rate of the per diem liquidated damages to be paid in the situations contemplated by Article 9. It is obviously not intended to spell out the situations where liquidated damages are to be paid and cannot, contrary to the Government's contention, control the language of Article 9.[4]

The impact of Article 9 on the facts of this case is clear. The contractor having failed to complete his work within the specified time, the Government exercised its option under the first part of Article 9 to terminate his right to proceed. This power to terminate could be exercised before or on the stipulated completion date or, as in this case, at any date thereafter. The Government

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session of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. . . ."

[4] The directions for the preparation of construction contracts upon the form here involved state that "The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract." It was pursuant to this direction that paragraph 5 of the specifications in the instant case was inserted. This instruction indicates that the specifications are to include no more than "the amount" or rate of per diem damages that are to be applied "as indicated in Article 9 of the contract."

then made other arrangements to complete the construction work and was entitled to, and did recover, the excess cost occasioned thereby. It thus waived its right to liquidated damages under the second part of Article 9. That right is conditioned upon the Government not terminating the contractor's right to proceed. Where there is such a termination, even though it be subsequent to the stipulated completion date, the right to liquidated damages disappears. Such has been the uniform and correct result heretofore reached in the application of this type of contract provision. See *United States* v. *Cunningham,* 125 F. 2d 28; *United States* v. *Maryland Casualty Co.,* 25 F. Supp. 778; *Maryland Casualty Co.* v. *United States,* 93 Ct. Cls. 247. See also *Fidelity & Casualty Co. of N. Y.* v. *United States,* 81 Ct. Cls. 495; *Commercial Casualty Insurance Co.* v. *United States,* 83 Ct. Cls. 367; *American Employer's Insurance Co.* v. *United States,* 91 Ct. Cls. 231.

The Government has urged us to read the second part of Article 9 as though the right to liquidated damages were based, not upon a condition precedent that the Government not terminate, but upon a continuing condition, under which liquidated damages would accrue "so long as the Government does not terminate" the contractor's right to proceed. This is said to be the only way to give full effect to the prime purpose of Section 21 of the 1902 Act to eliminate the uncertainties and difficulties of establishing actual damages to the Government by delay in obtaining the use of a public building. Otherwise proof is required of actual damages for the delay where termination occurs before completion in the teeth of a statute which dispenses with such proof in suits on a construction contract containing a stipulation "for liquidated damages for delay." The Government also claims that failure to allow it liquidated damages under these circumstances leaves it entirely to the contractor whether liquidated damages will ever be paid since he can relieve himself of such liability at any time short of completion simply by abandoning the work or provoking the Government to terminate his right to proceed. The Government contracting officers in turn would be induced to allow the contractor to proceed to completion despite inexcusable delays so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.

But we are confronted here with an unambiguous contract that clearly limits the right to liquidated damages to situations where the Government does not at any time terminate the contractor's right to proceed. That it may be wiser to expand the right to such damages to every case of delay, regardless of whether there is a termination, is of course not relevant in interpreting and applying clear words of limitation in the contract. We find nothing, moreover, in Section 21 of the 1902 Act that fills in interstices deliberately left open by the parties. No statutory language or policy forbids the Government and a contractor from stipulating for liquidated damages in limited situations only. Indeed the statute makes any such stipulation "conclusive and binding upon all parties," thereby foreclosing the Government's right to object to its own failure to insist upon liquidated damages in other situations. Since we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, the judgment below must be

Affirmed.